Public Prosecutor v Nagathevan a/l Manoharan & Ors

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NOS 45–64 OF 2005, 45–65 OF 2005 AND 45–74 OF 2005
NALLINI PATHMANATHAN JC
22 OCTOBER 2008

Criminal Law — Murder — Defence — Credible defence — Whether raised — Whether defence lacked credibility and truth — Whether raised reasonable doubt

Criminal Law — Murder — Whether intention to kill deceased present — Acts of accused — Whether spontaneous reaction towards acts of victim — Whether intention proved — Whether offence fell within s 304 of the Penal Code

Criminal Law — Offences — Murder — Motive — Failure to establish — Whether entire prosecution's case to be thrown overboard — Whether casts duty on court to scrutinise other evidence with greater care

Criminal Procedure — Charge — Multiple charges — Whether each charge to be tried separately — Proximity of time place and sequence of events — Whether fell within exception under s 170 of the Criminal Procedure Code — Whether joint trial would be in interest of justice — Criminal Procedure Code ss 164, 165, 166, 170

Criminal Procedure — Trial — Joint trial — Three accused charged with multiple charges — Proximity of time place and sequence of events — Whether fell within exception under s 170 of the Criminal Procedure Code — Whether joint trial would be in interest of justice — Criminal Procedure Code ss 164, 165, 166, 170

Evidence — Adverse inference — Failure to call witness — Whether witness's evidence material — Whether omission destroyed fabric of case

Evidence — Witness — Interested witness — Eye witnesses related to deceased victims — Whether evidence tainted with bias — Whether omissions and discrepancies by witness went to root of matter

Evidence — Witness — Multiple witnesses — Variations in versions of description of attack — Whether highly unlikely to give identical versions — Whether material contradiction existed

A In this case there were three accused persons namely Nagathevan a/l Manoharan ('Bontal'), Thenegaran a/l Murugan ('Lobo'), and Sivan a/l Kanthasamy ('Sivan'). The charges against them related to the murder of Raguram a/l Sandivelu ('Raguram'), Murali a/l Peragasamy ('Murali') and Thiayagarajan a/l Venketaswaran Rao ('Boy') who had all died soon after the
B attack. There were five charges preferred against the three accused persons. The first accused, Bontal, was alleged to have abetted the second accused, Lobo, to commit the offence of murder against two of the victims. Lobo was charged with the murder of Raguram and Murali and the third accused, Sivan
C was charged with the murder of Boy. The deaths occurred within the space of half an hour, in the area in front of the Maha Mariamman temple ('the temple') which was located several hundred yards away from another larger temple, the Selva Vinayagar temple, which was the centre of religious festivities on the night of the incident. Many of the guests at a wedding
D dinner, which was held on the same night, later went to participate in the prayers and to welcome the chariot from the temple. Murali was one of them. The events of the night were set out by several witnesses who were present at the scene of the incident. Four eye witnesses testified as to how the injuries were inflicted on one or more of the three victims resulting in their deaths.
E Further evidence by a medical expert relating to the injuries suffered by the victims and the causes of their deaths, and the evidence by a toxicologist pertaining to the levels of alcohol found in the bodies of the victims were also adduced.

F The first issue that was raised for consideration was whether there should be a joint or separate trial in respect of the accused persons and the charges against them. Further, it was submitted by the defence that the eye witnesses in this case were either related to, or close friends of the deceased victims in this case and therefore the evidence of these witnesses should be viewed with
G some degree of suspicion as they were not 'independent' witnesses, but 'interested' and 'related' witnesses. It was also contended that the evidence of the eyewitnesses, SP5 and SP3 differed materially in relation to the manner in which Raguram was held prior to his being stabbed. The defence also contended that the failure by the prosecution to ensure the attendance of one
H Jeganathan a/l Selvaraj ('Jeganathan') as a witness warranted adverse inference being drawn against the prosecution. However, at the end of the prosecution's case, the court concluded, based on the evidence presented by the prosecution that a prima facie case had been made out against Lobo and
I Sivan in respect of the murders of Raguram, Murali and Boy. The two accused were therefore required to enter their defence. On the other hand, no cogent evidence adduced for the charges against Bontal and the court concluded that a prima facie case had not been made out against him and was thus acquitted of the charges.

Held, convicting the second accused and sentencing him to 12 years imprisonment and convicting the third accused and sentencing him to 11 years imprisonment:

(1) Section 163 of the Criminal Procedure Code ('CPC') provides that each charge shall be tried separately save for the cases mentioned in ss 164, 165, 166 and 170 of the CPC. From the facts, it was clear that the separate charges against the three accused persons were so interconnected and linked as to form a part of the same transaction. As such this case fell within the exception contained in s 170 of the CPC. Further in view of the proximity of time, place and sequence of events, it appeared that a joint trial would be in the interests of justice, without affording prejudice to the accused persons (see paras 6–10).

(2) The fact that the eye-witnesses knew both the victims and the three accused persons, per se did not automatically mean that their evidence was tainted with bias. Given the answers of the witnesses during cross-examination and their evidence as a whole, their basic version of the events that night was incontrovertible. There were omissions and discrepancies, but it did not go to the root of the matter but discounted the possibility of concoction (see paras 83–85 & 101).

(3) Even if the versions of how Raguram was stabbed varied to some extent, it must be expected to be so because in this case all the players were in constant motion. Each eye-witness's recollection and description of the attack would differ in some aspects. The likelihood of the eye-witnesses giving identical versions is therefore highly unlikely and might even suggest an element of concoction. Accordingly no material contradiction between the versions of SP3 and SP5 arose (see para 96).

(4) The statement of Jeganathan under s 113 of the CPC was tendered and received in evidence and comprised a part of the record of evidence. In any event, the omission to identify Jeganathan did not detract substantially from the evidence of the eye witnesses because his evidence pertained to events immediately prior to the stabbing. In the circumstances, the inability to locate Jeganathan and call him as a witness did not destroy the fabric of the case (see paras 297–304).

(5) Lobo and Sivan have failed to raise a credible defence or a reasonable doubt in respect of the prosecution's case against them. The essence of their case was never put to the prosecution witnesses during the course of the prosecution's case. In fact, apart from seeking to damage the credibility of the prosecution witnesses, it was never clear what the defence was during the course of the prosecution's case. It appeared that the defence was very much an afterthought that had been fabricated to

meet the prosecution's case. More significantly, the defence version of events lacked credibility and truth in the face of the evidence (see paras 305–306).

(6) On the other hand, from entirety of the evidence there appeared to be no reason for the eyewitnesses to fabricate the entirety of their version of events, which was further corroborated by the evidence of the pathologist. Their credibility remained unshaken by the defence version of events which did not serve to refute or contradict their version in detail, but simply removed the key players, ie the accused persons from the scene of the incident at the relevant time. In the circumstances, on a consideration of the evidence in its entirety, Lobo and Sivan had failed to raise a reasonable doubt through their defence in respect of the charges brought and proved against them. The prosecution had proved beyond reasonable doubt that Lobo and Sivan caused the deaths of the three victims (see para 307).

(7) Further, the failure by the prosecution to establish the motive for the crime did not mean that the entire prosecution's case had to be thrown overboard. Instead, it only casts a duty on the court to scrutinise the other evidence, particularly of the eyewitnesses' with greater care. In the instant case, such an analysis had indeed been undertaken, particularly in relation to the numerous issues raised by the defence in the course of the trial. Therefore, at the end of the analysis that the eyewitnesses' accounts were corroborative as was the evidence of the pathologist (see paras 308–309).

(8) The act of directing and plunging the knife into Boy's chest in the region of his heart to the depth penetrated, warranted the conclusion that Sivan was intent on causing such bodily injury as is likely to cause death. It was not possible however to conclude with any degree of certainty that the injury inflicted by Sivan must in all probability have caused Boy's death. This was because of the almost spontaneous reaction of Sivan in reacting to Boy's acts did not suggest any degree of premeditation. The facts of this case therefore appear to fell within the lesser offence of culpable homicide not amounting to murder falling within the first part of s 304 of the Penal Code ('the Code') (see para 312).

(9) Lobo's acts of attacking and stabbing Raguram fell within the ambit of the s 300 of the Code in that the manner and circumstances of the attack showed that Lobo took undue advantage of Raguram and acted in a cruel manner, warranting the attribution of an intention to kill. However, such an intention was not ascribed to Lobo's actions in relation to Murali, in that the chronology of events suggested that the attack on him was brought about by way of a response to his intervention in attempting to extricate Raguram. It was therefore not

evident that Lobo intended to kill Murali. In accordance with the distinction between culpable homicide and murder as set out in the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 177, it appeared that the act of Lobo in attacking and slashing Murali's neck more properly fell within the ambit of culpable homicide rather than murder (see paras 314–315).

[Bahasa Malaysia summary

Di dalam kes ini terdapat tiga orang tertuduh iaitu Nagathevan a/l Manoharan ('Bontal'), Thenegaran a/l Murugan ('Lobo'), dan Sivan a/l Kanthasamy ('Sivan'). Pertuduhan terhadap mereka adalah berkaitan dengan pembuhuhan Raguram a/l Sandivelu ('Raguram'), Murali a/l Peragasamy ('Murali') and Thiayagarajan a/l Venketaswaran Rao ('Boy') yang kesemuanya mati sejurus selepas diserang. Terdapat lima pertuduhan yang dikenakan terhadap ketiga-tiga tertuduh. Tertuduh pertama, Bontal, didakwa bersubahat dengan tertuduh kedua, Lobo, untuk melakukan kesalahan membunuh terhadap dua daripada mangsa tersebut. Lobo dituduh membunuh Raguram dan Murali dan tertuduh ketiga, Sivan, dituduh membunuh Boy. Kematian berlaku dalam jarak tempoh setengah jam, di kawasan berhadapan dengan kuil Maha Mariamman ('kuil tersebut') yang terletak beberapa ela dari satu lagi kuil yang lebih besar, kuil Selva Vinayagar, yang merupakan tumpuan perayaan keagamaan pada malam kejadian. Kebanyakan daripada tetamu ke jamuan makan malam perkahwinan, yang diadakan pada malam yang sama, kemudiannya pergi untuk menyertai upacara sembahyang dan untuk menyambut rata ('chariot') dari kuil tersebut. Murali adalah salah seorang daripada mereka. Kejadian pada malam tersebut dijelaskan oleh beberapa orang saksi yang berada di tempat kejadian tersebut. Empat orang saksi memberikan keterangan mengenai bagaimana kecederaan diakibatkan ke atas salah seorang atau lebih daripada tiga orang mangsa mengakibatkan kematian mereka. Keterangan lanjut daripada pakar perubatan berkaitan dengan kecederaan yang dialami oleh mangsa-mangsa dan sebab kematian mereka dan keterangan oleh ahli toksikologi berkaitan dengan tahap alkohol yang didapati di dalam badan mangsa juga dikemukakan.

Isu pertama yang dibangkitkan untuk pertimbangan adalah sama ada perlu terdapat perbicaraan bersama atau berasingan berkenaan dengan tertuduh-tertuduh dan pertuduhan terhadap mereka. Selanjutnya, ia dihujahkan oleh pembelaan bahawa saksi-saksi di dalam kes ini adalah sama ada mempunyai hubungan dengan, atau kawan rapat mangsa yang mati di dalam kes ini dan oleh itu keterangan saksi-saksi ini harus dilihat dengan sedikit kesangsian kerana mereka bukan saksi-saksi 'bebas' tetapi saksi-saksi yang 'berkepentingan' dan 'mempunyai hubungan'. Ia juga dihujahkan bahawa keterangan saksi-saksi, SP5 dan SP3, berbeza secara material

berkaitan dengan cara bagaimana Raguram dipegang sebelum ditikam. Pihak pembelaan juga menghujah bahawa kegagalan pihak pendakwaan untuk memastikan kehadiran Jeganathan a/l Selvaraj ('Jeganathan') sebagai saksi mewajarkan anggapan bertentangan dibangkitkan terhadap pihak pendakwaan. Walau bagaimanapun, di akhir kes pendakwaan, mahkamah memutuskan, berdasarkan kepada keterangan yang dikemukakan oleh pihak pendakwaan bahawa kes prima facie telah dibuktikan terhadap Lobo dan Sivan berkaitan dengan pembunuhan Raguram, Murali dan Boy. Kedua-dua tertuduh kemudian disuruh membela diri. Sebaliknya, tidak ada keterangan yang meyakinkan dikemukakan bagi pertuduhan terhadap Bontal dan mahkamah memutuskan bahawa kes prima facie tidak dibuktikan terhadapnya dan oleh itu membebaskannya daripada pertuduhan-pertuduhan tersebut.

Diputuskan, mensabitkan tertuduh kedua dan menghukumnya kepada penjara 12 tahun dan mensabitkan tertuduh ketiga dan menghukumnya kepada penjara 11 tahun:

(1) Seksyen 163 Kanun Prosedur Jenayah ('KPJ') memperuntukkan bahawa setiap pertuduhan sepatutnya dibicarakan secara berasingan kecuali untuk kes-kes yang dinyatakan dalam ss 164, 165, 166 dan 170 KPJ. Daripada fakta, adalah jelas bahawa pertuduhan yang berasingan terhadap ketiga-tiga tertuduh adalah saling berkait dan berhubungan sehingga membentuk sebahagian daripada transaksi yang sama. Oleh itu kes ini termaktub dalam kecualian yang terkandung di dalam s 170 KPJ. Selanjutnya, disebabkan oleh kehampiran masa, tempat dan urutan peristiwa, ia jelas bahawa perbicaraan bersama adalah dalam kepentingan keadilan, tanpa menyebabkan prejudis kepada tertuduh-tertuduh (lihat perenggan 6–10).

(2) Fakta bahawa saksi-saksi mengenali kedua-dua mangsa dan ketiga-tiga tertuduh semata-mata secara sendirinya tidak bermaksud bahawa keterangan mereka dicemari oleh sikap berat sebelah. Mempertimbangkan jawapan saksi-saksi semasa pemeriksaan balas dan keterangan secara keseluruhannya, versi asas mereka tentang kejadian pada malam tersebut tidak dapat dipertikaikan. Terdapat peninggalan dan percanggahan, tetapi ia tidak menjejaskan asas perkara tersebut tetapi mematahkan kemungkinan mereka cerita (lihat perenggan 83–85 & 101).

(3) Walaupun versi tentang bagaimana Raguram ditikam berbeza setakat yang tertentu, ia harus dijangka berlaku kerana di dalam kes ini semua yang terlibat sentiasa bergerak. Ingatan dan gambaran kesemua saksi tentang serangan tersebut akan berbeza dalam aspek yang tertentu. Kemungkinan saksi memberikan versi yang serupa adalah amat rendah

dan mungkin menyarankan unsur rekaan cerita. Oleh yang demikian tidak terdapat percanggahan yang material di antara versi-versi SP3 dan SP5 berbangkit (lihat perenggan 96).

(4) Kenyataan Jeganathan di bawah s 113 KPJ telah dikemukakan dan diterima sebagai keterangan dan membentuk sebahagian rekod keterangan. Walau bagaimanapun, kegagalan untuk mengenal pasti Jeganathan tidak menjejaskan secara substansial keterangan saksi kerana keterangannya adalah berkaitan dengan kejadian sejurus sebelum penikaman. Dalam hal ini, ketidakbolehan untuk mengesan Jeganathan dan memanggilnya sebagai saksi tidak memusnahkan struktur kes tersebut (lihat perenggan 297–304).

(5) Lobo dan Sivan telah gagal untuk membangkitkan pembelaan yang boleh dipercayai atau keraguan yang munasabah berkaitan dengan kes pihak pendakwaan terhadap mereka. Pada asasnya, kes mereka tidak dikemukakan kepada saksi pihak pendakwaan semasa kes pihak pendakwaan. Malah, selain daripada cuba untuk mematahkan kebolehpercayaan saksi pihak pendakwaan, ia tidak jelas apakah pembelaan mereka semasa kes pihak pendakwaan. Ia jelas bahawa pembelaan lebih kepada fikir semula yang telah direka untuk membalas kes pihak pendakwaan. Lebih ketara lagi, versi pembelaan kekurangan kredibiliti dan kebenaran yang jelas dalam keterangan mereka (lihat perenggan 305–306).

(6) Sebaliknya, dari keseluruhan keterangan jelas tidak ada alasan untuk saksi mereka keseluruhan versi kejadian, yang disokong secara lanjut oleh keterangan ahli patologi. Kredibiliti mereka kekal tidak digugat oleh versi kejadian pihak pembelaan yang tidak menyangkal atau menyanggah versi mereka secara terperinci, tetapi semata-mata menyingkirkan anggota utama iaitu tertuduh-tertuduh dari tempat kejadian pada waktu yang berkenaan. Dalam hal ini, atas pertimbangan keterangan secara keseluruhannya, Lobo dan Sivan telah gagal untuk membangkitkan keraguan yang munasabah melalui pembelaan mereka berkaitan dengan pertuduhan yang dikemukakan dan dibuktikan terhadap mereka. Pihak pendakwaan telah membuktikan melampaui keraguan yang munasabah, bahawa Lobo dan Sivan telah menyebabkan kematian ketiga-tiga mangsa (lihat perenggan 307).

(7) Selanjutnya, kegagalan pihak pendakwaan untuk membuktikan motif untuk jenayah tersebut tidak bermaksud bahawa keseluruhan kes pihak pendakwaan harus diketepikan. Sebaliknya, ia hanya meletakkan tanggungjawab kepada mahkamah untuk meneliti keterangan lain,

khususnya keterangan saksi dengan lebih teliti. Di dalam kes ini, analisa sedemikian telah sememangnya dibuat, khususnya berkaitan dengan berbagai-bagai isu yang dibangkitkan oleh pembelaan semasa perbicaraan. Oleh itu di akhir analisa tersebut keterangan saksi adalah menyokong sama seperti keterangan ahli patologi (lihat perenggan 308–309).

(8) Tindakan mengarahkan dan membenamkan pisau ke dalam dada Boy di bahagian yang berhampiran dengan jantungnya setakat kedalaman yang ditikamnya, mewajarkan kesimpulan bahawa Sivan memang berniat untuk menyebabkan kecederaan diri yang sedemikian yang berkemungkinan menyebabkan kematian. Walau bagaimanapun, ia tidak mungkin untuk memutuskan dengan apa-apa kepastian bahawa kecederaan yang disebabkan oleh Sivan semestinya atas kemungkinan yang besar telah menyebabkan kematian Boy. Ini adalah kerana tindak balas yang hampir spontan oleh Sivan dalam membalas tindakan Boy tidak menyarankan apa-apa takat perancangan. Fakta kes ini oleh itu terangkum dalam kesalahan yang lebih ringan iaitu, homisid salah yang tidak menjumlahkan kepada pembunuhan yang terangkum di bawah bahagian pertama s 304 Kanun Keseksaan ('Kanun') (lihat perenggan 312).

(9) Tindakan Lobo menyerang dan menikam Raguram jatuh di bawah rangkuman s 300 Kanun tersebut di mana cara dan keadaan serangan menunjukkan bahawa Lobo mengambil kesempatan terhadap Raguram dan bertindak secara kejam, yang mewajarkan bahawa dia mempunyai niat untuk membunuh. Walau bagaimanapun, niat sedemikian tidak diperlihatkan dalam tindakan Lobo terhadap Murali, di mana turutan peristiwa menyarankan bahawa serangan ke atasnya dibuat sebagai tindak balas atas campur tangannya dalam mencuba untuk menyelamatkan Raguram. Oleh itu ia tidak dibuktikan bahawa Lobo berniat untuk membunuh Murali. Berikutan dengan perbezaan di antara homisid salah dan pembunuhan yang terdapat di dalam kes *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 177, ia jelas bahawa tindakan Lobo dalam menyerang dan mengelar leher Murali sewajarnya jatuh di dalam rangkuman homisid salah dan bukannya pembunuhan (lihat perenggan 314–315).]

Notes

Cases referred to

Akil Ali & Ors v State of Assam 1981 Cri LJ 516 (refd)
Alcontara a/l Ambrose Anthony v PP [1996] 1 MLJ 209, FC (refd)

Amrita Lal Hazra v Emperor 42 Cal 957 (refd)
Babulal Choukhani v Emperor AIR 1938 PC 130 (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Balasingham v PP [1959] MLJ 193 (refd)
Bharwada Bhoginbhai Hirjibhai AIR 1983 SC 753 (refd)
Chean Siong Guat v PP [1969] 2 MLJ 63, HC (refd)
Chin Choy v PP [1955] MLJ 236, CA (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29, HC (refd)
Chua Keem Long v PP [1996] 1 SLR 510, HC (refd)
Dahirai Riang v The State AIR 1964 Tripura 54 (refd)
Ferguson v Weaving [1951] 1 KB 814 (refd)
Gopal Singh v State of Uttar Pradesh AIR 1979 SC 1822 (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88, HC (refd)
Kumar Majhi v State 1981 Cri LJ 1787 (refd)
Liew Kaling & Ors v PP [1960] MLJ 306, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Malak Khan v Emperor AIR 1946 PC 16 (refd)
Mariadasan and others v State of Tamil Nadu AIR 1980 SC 573, SC (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohamed Yasin bin Hussin v PP [1976] 1 MLJ 156, PC (refd)
Nachhittar Singh v State of Punjab AIR 1975 SC 118 (refd)
Pie bin Chin v PP [1985] 1 MLJ 234, HC (refd)
PP v Basar [1965] 1 MLJ 75, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15, HC (refd)
PP v Mohd bin Mohd Razali & Ors [2002] 5 MLJ 406, HC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16, HC (refd)
PP v Zulkipli bin Othman & Ors [2005] 5 MLJ 170, HC (refd)
Queen v Contey & Ors, The (1882) 8 QBD 534 (refd)
Rex v Grondkowski, Rex v Malinowski [1946] KB 369, CA (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Sainal Abidin bin Mading v PP [1997] 4 MLJ 497, CA (refd)
Seneviratne v R [1936] 3 All ER 36, PC (refd)
State of Haryana v Sher Singh 1981 Cri LJ 714 (refd)
State of Uttar Pradesh v Hakim Singh AIR 1980 SC 184 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 177, FC (refd)
Ugar Abir and others v The State of Bihar AIR 1965 SC 277 (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465, SC (folld)

Legislation referred to

Criminal Procedure Code ss 112, 163, 164, 165, 166, 170, 180, 182A
Evidence Act 1950 s 114(g)
Penal Code ss 109, 299, 300, 300(a), (b), (c), (d), 302, 304(a)
Penal Code [India] s 302

Azar Irwan bin Moh Arifin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
SK Pari (Pari & Co) for the first accused.
Ayasamy Veloo (V Samy & Co) for the second accused.
Jagathiswaran Ramachandran (The Chambers of Jag Ramachandran) for the third accused.

Nallini Pathmanathan JC:

INTRODUCTION

[1] Between 11.45pm on the 18 September 2004 and the early hours of the morning of 19 September 2004, on a day carrying considerable religious significance for persons professing the Hindu faith, three young men in the prime of their lives were slain. This trilogy of deaths occurred within the space of half an hour in quick succession, in the area in front of the Maha Mariamman temple ('the temple') at Jalan Tepi Sungai, Klang. The temple is a small structure abutting the road. In the vicinity of the temple located several hundred yards away, but visible, is another much larger, temple known as the Selva Vinayagar temple, which was the centre of festivities that night.

[2] At the time when the three men were killed, a large crowd of devotees were performing prayers in and around the temple, awaiting the arrival of a chariot, and a large procession behind it, in accordance with the annually undertaken customs and rituals of a Hindu religious festival known as Vinayagar Chaturthi.

[3] The three men who lost their lives that night were Raguram a/l Sandivelu aged twenty six, ('Raguram'), Murali a/l Peragasamy aged twenty six ('Murali') and Thiayagarajan a/l Venketaswaran Rao aged seventeen who was called 'Boy' ('Boy'). These three victims died soon after the attack, despite being rushed to the nearest hospital in Hospital Tengku Ampuan Rahimah Klang.

[4] Police investigations ensued and as a consequence charges were brought against three men, the three accused persons before this court, namely Nagathevan a/l Manoharan who is commonly referred to as 'Bontal' ('Bontal'); Thenegaran a/l Murugan who is commonly referred to as 'Lobo' ('Lobo'); and Sivan a/l Kanthasamy ('Sivan').

THE CHARGE

[5] The charges against the three accused in English are as follows:

(a) As against the first accused, Bontal:

First charge:

> That you on 19 September at about 12.05am in front of the Kuil Sri Maha Mariyaman, Jalan Tepi Sungai, Klang, in the district of Klang, in the state of Selangor Darul Ehsan, with intention did conspire to commit murder, that is causing the death of an Indian male named Raguram a/l Sandivelu (KPT: 7803-10-5495) and by reason thereof you have committed an offence that is punishable under s 302 of the Penal Code read together with s 109 of the Code.

Second charge:

> That you on the 19 September at about 12.05am in front of the Kuil Sri Maha Mariyaman, Jalan Tepi Sungai, Klang in the district of Klang in the state of Selangor Darul Ehsan, with intention did conspire in committing murder namely causing the death of an Indian male named Murali a/l Peragasamy (KPT: 760521-10-5121) and by reason thereof, you have committed an offence punishable under s 302 of the Penal Code read together with s 109 of the Code.

The charges against Bontal, in summary relate to his conspiring with others to commit murder resulting in the deaths of Raguram and Murali.

(b) As against the second accused, Lobo:

First charge:

> That you on the 19 of September at about 12.05am in front of the Kuil Sri Maha Mariyaman, Jalan Tepi Sungai Klang, in the district of Klang in the state of Selangor Darul Ehsan, did commit murder ie causing the death of an Indian male by the name of Raguram a/l Sandivelu (KPT: 7803-10-5495) and by reason thereof you have committed an offence punishable under s 302 of the Penal Code read together with s 109 of the Code.

Second charge:

> That you on the 19 of Septemberat about 12.05am in front of the Kuil Sri Maha Mariyaman Jalan Tepi Sungai Klang, in the district of Klang in the state of Selangor Darul Ehsan, did commit murder ie causing the death of an Indian male by the name of Murali a/l Peragasamy (KPT: 760521-10-5121) and by reason thereof you have committed an offence punishable under s 302 of the Penal Code read together with s 109 of the Code.

(c) As against the third accused, Sivan:

> That you on the 19 September at about 12.05am in front of the Kuil Sri Maha Mariyaman Jalan Tepi Sungai Klang, in the district of Klang in the state of Selangor Darul Ehsan, did commit murder ie, causing the death of an Indian male by the name of Thiyagarajan a/l Venkestaswaran Rao (KPT: 760521-10-5121) and by reason thereof you have committed an offence punishable under s 302 of the Penal Code read together with s 109 of the Code.

JOINT TRIAL

[6] In this case there are three accused persons and five charges. The first issue that arose for consideration was whether there should be a joint or separate trial in respect of the accused persons and the charges against them. Section 163 of the Criminal Procedure Code ('CPC') provides that each charge shall be tried separately save for the cases mentioned in ss 164, 165, 166 and 170 of the CPC. The relevant exception for the purposes of this case is s 170 of the CPC which provides as follows:

> (1) *When more persons than one are accused* of the same offence or *of different offences committed in the same transaction, or when one person is accused of committing an offence and another of abetment of or an attempt to commit the same offence,* they may be charged and *tried together or separately as the Court thinks fit*, and the provisions contained in the former part of this Chapter shall apply to all such charges ... (Emphasis added.)

[7] This is the sole section in the Criminal Procedure Code that deals with the joint trial of more than one person. The section provides for three situations in which several persons may be charged and tried together. The decision whether to order separate trials or a joint trial is to be made at the outset of the trial by the trial judge exercising his discretionary power judicially. In making its decision the court considers whether a joint trial will be fair and just and whether any of the accused would be prejudiced by such a trial. In *Rex v Grondkowski, Rex v Malinowski* [1946] KB 369 the English Court of Criminal Appeal stated as follows:

> The law is, and always has been, that this is a matter of discretion for the judge at the trial. The court so stated the law in this very case, and quite recently in *Youth v R* [1945] WN 27 the Judicial Committee said that the question of joint or several trials had always been left to the discretion of the presiding judge. The discretion, no doubt, must be exercised judicially, that is not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it.

[8] In *Babulal Choukhani v Emperor* AIR 1938 PC 130 it was held that the relevant point of time in the proceedings at which it is to be decided whether the offences comprise a part of the 'same transaction' is at the time of accusation and not that of the eventual decision.

[9] Accordingly, the issue that fell for consideration at the outset of the trial was whether these offences and accused persons could be said to fall within s 170 of the CPC. The first accused, Bontal is alleged to have abetted the second accused, Lobo to commit the offence of murder against two of the victims. This falls clearly within the latter limb of s 170 of the CPC. The third accused, Sivan is alleged to have committed the murder of the third victim at around the same time, at the same place and almost immediately after the first two murders. The question is whether this last charge can be considered '... a different offence committed in the same transaction ...'. While there is no exhaustive definition of what comprises the 'same transaction' and each case must depend on its own particular facts, there are certain significant features that characterise acts that form a part of the same transaction. The test is whether the fifth charge made against the third accused, Sivan comprises one of a series of acts so connected together as to form the same transaction. In a series of cases from *Chin Choy v Public Prosecutor* [1955] MLJ 236 to *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88, the Malaysian courts have approved the test enunciated in *Amrita Lal Hazra v Emperor* 42 Cal 957 which specifies four indicia which assist in the consideration of whether the charges in question comprise a part of the same transaction. They are:

(i) proximity of time — in the instant case, all the five offences were alleged to have been committed at around the same time;

(ii) unity or proximity of place — all the five offences were alleged to have been committed at the same place;

(iii) continuity of action — all the five offences are similar and committed at the same time and place; and

(iv) continuity of unity or design — the three accused are charged with the commission of the offences of murder or attempted murder which occurred consecutively within a space of about half an hour. As the facts of the instant case satisfy the criteria set out above, it would appear that the separate charges against the three accused persons are so interconnected and linked as to form a part of the same transaction. As such this case falls within the exception contained in s 170 of the CPC.

[10] It was also considered whether there would be prejudice afforded to any of the three accused if the trial were to proceed as a joint trial. In view of the proximity of time, place and sequence of events it appeared that a joint trial would be in the interests of justice, without affording prejudice to the accused persons. Accordingly the joint trial proceeded. At all times, both the prosecution and the defence were ad idem that the trial should proceed by way of a joint trial.

FACTS OF THE CASE

[11] A total of twenty one witnesses gave evidence during the course of the prosecution's case. Of these twenty one, four witnesses gave eye accounts of their having witnessed the injuries being inflicted on one or more of the three victims, which resulted in their death. Five of the other witnesses gave accounts of events immediately prior to and after the three incidents resulting in the deaths of the victims. The remaining witnesses gave evidence pertaining to the investigation, while a medical expert gave evidence relating to the injuries suffered by the victims and the causes of their deaths while a toxicologist gave evidence pertaining to the levels of alcohol found in the bodies of the victims.

Chronology of events

(1) The wedding dinner

[12] On the evening of 18 September 2004 a wedding dinner was held at a house bearing address No 29, Jalan Sungai 11, Taman Kota Jaya, Off Jalan Tepi Sungai, Klang. The JKR quarters are situated close to the temple as is evident from exh P6. The dinner was held in honour of the marriage of the second victim, Murali's elder brother, Baalasantar a/l Peragasamy, SP8 ('Baalasantar') on 16 September 2004. Murali, his parents and relatives were all present at the dinner celebration as were several of his friends, including the first victim, Raguram. Several other friends who subsequently gave evidence at this trial were also present at the wedding dinner that night, although for varying periods of time. They included Pragash a/l Patanvattaya, SP2 ('Pragash'), Satisgopal a/l Pannerselvam, SP3 ('Satisgopal'), Satis a/l Krisnan, SP4 ('Satis') and Datchinamoorthy a/l Kathan, SP5 ('Datchinamoorthy'). Baalasantar, SP8 testified that the wedding dinner commenced at about 7.30pm and finished around 11.30pm. According to him there was no liquor served at the dinner, only syrup and water.

(2) The religious festival

[13] The dinner was held on the same night as the religious festival of Vinayagar Chaturthi. This Hindu festival which is celebrated yearly culminates at the Selva Vinayagar temple, situated (as described above) several hundred yards adjacent and behind the temple (ie the Maha Mariamman temple), with a large religious procession led by a chariot. The route taken by the chariot goes past, and stops at the Maha Mariamman temple, before completing its journey in the Selva Vinayagar temple. Large crowds accompany the chariot throughout its entire journey, as well as await its passage at various points through its pre-planned route, offering prayers and coconuts.

[14] On the 18 September 2004, many of the guests at Baalasantar's wedding dinner, went from there directly onto the temple to participate in the prayers and to welcome the chariot and procession as it went past. Murali left the wedding dinner at around 11.30pm in a lorry for the temple and intending to then proceed to work. He worked as a lorry driver at Port Klang. It was not clear when the first victim, Raguram left the wedding dinner for the temple. The third victim, Boy, did not attend the wedding dinner that night, but arrived at the temple later that night.

A description of the area surrounding the temple

[15] The temple (ie the Maha Mariamman temple) was located at Jalan Tepi Sungai in Klang. It was a small temple facing onto a road directly in front of it. In 2004 there were Jabatan Kerjaraya quarters located opposite the temple towards the right, as well as flanking the temple on the left. Beyond the quarters adjoining the temple, some distance away and located adjacent and slightly to the rear of these JKR Quarters is the Selva Vinayagar temple, which is considerably larger.

[16] For the purposes of the Vinayagar Chaturthi' religious festival, a temporary tent like structure had been erected directly opposite the front of the Mariamman temple. The road between the tent and the front of the temple was relatively narrow. The tent did not have cloth walls extending to the ground. It comprised poles with a roof but with no walls, thereby resembling a shed. The witnesses all referred to the structure as 'khemah' whilst speaking in the Tamil language. There were some decorations in the form of coloured lights and small flags strung at the top of the tent, and banana plant stems and leaves tethered to the poles of the structure. A clear view could therefore be had of the surrounding area even from within the structure as there were no walls to the tent. This is evident from exh P5A, one of only two photographs taken at the murder site. The events that follow

A appear to have occurred in front of the Mariamman temple, largely in the area between the temple and the tent.

The events between 11.45pm on 18 September 2004 and 12.15am on 19 September 2004

B

[17] The events of that night were set out by several witnesses who were present at the festivities. In setting out the salient facts, the events as described by these several witnesses is set out in order to provide a chronology of the C events. The detailed versions given by these witnesses will be examined and dealt with in greater depth later on in the grounds when it falls to be considered whether a prima facie case had indeed been made out against each of the accused in this case.

D *What did Satisgopal, SP3 see that night?*

[18] Satisgopal, SP3 is related to one of the victims, Murali. He is Murali's cousin. He gave evidence that he was at the wedding dinner from 8pm to 10pm on the night of 18 September 2004. After this he went first to the Selva E Vinayagar temple at about 10.15pm. Later on that night he came back to the Maha Mariamman temple and was with his friends in the tent opposite the temple, distributing food to devotees. Satisgopal, SP3 described how drums were being played and people were dancing to the beat of the drums. In short the atmosphere was festive and carnival like. It was a public celebration of a F religious festival. Satisgopal, SP3 said that at about 11.55pm he was in the tent where food was being distributed to the devotees. The chariot and procession had not gone past the temple yet, but was about 30 metres away. He was standing in front of the tent, facing the temple and looking slightly to the right, while listening to the drums and watching people dancing, when G a fight broke out. According to him, he heard shouts of 'Fight! Fight!' in Tamil.

[19] When he looked sideways he saw that Lobo had put his hands round the first victim, Raguram's neck and pulled him to the edge of the tent. H Satisgopal, SP3 then stated that he saw Lobo stab the first victim, Raguram in the chest with a knife. He demonstrated how Lobo held Raguram and stabbed him which may be described as follows: Lobo stood behind the victim, Raguram and used his left arm to hold him firmly around the neck and close to Lobo's body. He used his other hand with the knife to stab I Raguram in the chest. He maintained clearly that he saw Lobo taking the knife out of Raguram's chest. He said that he saw Lobo stabbing Raguram only once. When Raguram was stabbed there were people all around him. When he was stabbed they fled in all directions. Satisgopal, SP3 recalled that the knife was eight to nine inches or 20 cm long but could not recollect the

colour of the knife or the brand. He did not hear Raguram shout for help, nor did he immediately see any blood. After Lobo had pulled out the dagger from Raguram's chest, Raguram fell to the ground. Satisgopal, SP3 stated he was about 1.5 metres away when he saw Lobo stabbing Raguram. Satisgopal, SP3 could recognise the assailant as being Lobo because he knew Lobo, having known him for some three to four months prior to the incident. When Raguram was stabbed, the second victim, Murali, stepped forward and intervened, pulling Raguram's hand in an attempt to draw him away. According to Satisgopal, SP3, a person whose face he did not see, then slashed Murali's neck from the back. The slash wound was directed to and affected on Murali's neck at the level of the carotid artery. Murali also collapsed. Satisgopal, SP3 maintained that he could see Murali's face, while Murali had his back to the tent. Satisgopal, SP3 estimated that he was about five metres away from where the point where Murali's neck was slashed.

[20] Then Satisgopal, SP3 testified he saw the third accused, Sivan, stab the third victim, Boy once in the chest with a knife. Boy collapsed on the ground. He could not remember the length or type of knife utilised. According to him, Sivan used his right hand to stab Boy. He viewed the stabbing from a distance of about 1.5 metres. Sivan then threatened Satisgopal, SP3 and his friends, saying that if any of them came near him he would hurt them. He went on to say that Boy was stabbed within about five minutes of Murali being slashed in the neck. Bontal, the first accused was also there carrying a long knife or 'parang' and pointing it towards Satisgopal, SP3. A fracas ensued with Satisgopal taking hold of the long knife or parang after which Bontal hit him with a helmet. There were no further injuries and after this Satisgopal, SP3 and others assisted in carrying Murali and the other victims towards transportation for medical aid. Murali was taken to hospital in a Proton Saga driven by one Vivekanandan a/l Kuppusamy, SP12. Murali was having great difficulty in breathing by the time he was carried to the car and taken to hospital. He died soon after.

[21] Raguram, the first victim, and Boy, the third victim, were placed in ambulances that arrived and also transported to the Hospital Tengku Ampuan Rahimah in Klang. They also died soon after that.

The evidence of Pragash a/l Pattanvattaya, SP2 on the night of 18 September 2004

[22] Pragash, SP2 is the nephew of the second victim, Murali. He attended the wedding dinner for Baalasantar, SP8 before proceeding to the Mariamman temple. He gave evidence that he was in the grounds of the Mariamman temple after 8.30pm, and probably at about 9.15pm.

A **[23]** He was at the tent opposite the Mariamman temple. Pragash, SP2 said that at around 11.55pm or 12 midnight, he was busy arranging items for prayers and packaging food for distribution to the devotees who were present, awaiting the arrival of the chariot. The chariot was approaching but had not reached the Mariamman temple or the tent like structure. Food was B distributed from the tent. His family was there. So were his friends and relatives, Satisgopal, SP3, Satis, SP4, Datchinamoorthy, SP6 and one Sujan, according to him.

[24] SP2 described the scene at the time as being very crowded. Drums C were being played inside the Mariamman temple but could be heard in the grounds, according to him. There was light from a street lamp on the road behind the temple as well as coloured lights from the tent. There were people dancing outside the tent in front of the temple. He estimated that Raguram and Murali arrived at the grounds of the Mariamman temple around D 9.45pm–10pm.

[25] Pragash, SP2 said he saw Raguram dancing in front of the temple. At around this time he heard a lot of noise outside the tent like structure. He heard the sound of shouts and people fighting before the chariot had passed E the temple. In cross-examination, he maintained that he could hear the sounds of a fight despite the noise of the crowd, the drums and the procession which was in the distance about 15 metres away.

F **[26]** He moved out of the tent like structure and saw a fight taking place in front of the structure. In examination in chief, Pragash, SP2 said that he saw Raguram being beaten by a few people. However during cross-examination he agreed that he did not actually see Raguram being beaten. In the course of re-examination he clarified the issue by stating that G when he first saw Raguram being beaten, there were many people around him, so he could not see clearly. After that, this mass of people lessened as they moved away, and he could see Raguram being beaten. What he did see clearly was Murali rushing into the crowd of people encircling Raguram and pulling him out of the crowd, to prevent him from being further injured. H Then he maintained that he saw Lobo slashing Murali's neck from behind Murali. In his evidence, Pragash, SP2 maintained that Lobo did not bodily touch or hold Murali when he slashed his neck. According to him, Murali was facing Raguram and holding Raguram's hand when his neck was slashed from behind by Lobo. Raguram by this time had fallen on his back to the I ground. Lobo used a small knife, which Pragash, SP2 described as being about 22cm or about nine inches long. He could not identify the type or brand of knife. His evidence was that Lobo held the knife in his right hand.

[27] Pragash, SP2 did not hear Murali shout. Murali then moved towards the tent while holding his neck where he had been slashed. Blood was flowing from Murali's neck. In cross-examination, Pragash, SP2 clarified that after Murali's neck was slashed, he let go of Raguram's hand, which he had been holding in an attempt to assist him by pulling him away. Murali then took a few steps and fell to the ground. Murali was unarmed at all times.

[28] By this time people were running away and dispersing madly in all directions. Then Pragash, SP2, his relative, one Sivam a/l Muniandy, SP7 and his other friends lifted Murali and carried him to the nearest vehicle to get him medical assistance. Murali was only half conscious by this time. There was a lot of blood flowing from his wound. Pragash, SP2 said he saw a large wound to Murali's neck but could not ascertain the depth of the wound. His friend, Vivek, SP12 used his motorcar, a Proton bearing vehicle number plate '7444' to transport Murali to the vehicle. According to Pragash, SP2 Sivam, Murali's brother, Mothi, SP6 and Vivek, SP12 took Murali to the hospital.

[29] The chariot which had not gone past at the time of the slashing had gone past by the time Murali was laid on his back on the rear seats of Vivek's car. When Pragash, SP2 and his friends and relatives were moving Murali to the car, Pragash, SP2 said he saw Bontal standing at the place of the incident. However he could not recall Bontal holding a knife.

[30] After Vivek's car had left the scene, Pragash, SP2 and his friends noted that Raguram and Boy were lying on the ground in the vicinity. He said that from afar Raguram appeared to be in a critical state, gasping for breath. He noted a considerable amount of blood in the region of Raguram's chest. Pragash, SP2 said that when he saw Boy he was lying face down on the ground. He turned Boy around and saw that he had been stabbed in the chest. Raguram and Boy were carried by Pragash, SP2, Satisgopal, SP3, Satis, SP4 and others and placed in the ambulances that were present. Raguram and Boy were also taken to the Hospital Tengku Ampuan Rahimah in Klang.

[31] After this some persons who were wearing full face helmets started beating Pragash, SP2 and his cousin, Satisgopal, SP3. They both ran away towards the Selva Vinayagar temple. From there, Pragash's father took both of them back home. They then went later that night to the hospital where Pragash, SP2 heard that Raguram, Murali and Boy had all passed away. On the 19 September 2004, Pragash, SP2 attended an identification parade held by the police and identified Lobo and Bontal. Pragash, SP2 gave evidence that he had previously seen Lobo although he did not know him. When he

was staying at the JKR Quarters, Lobo had also stayed there and he had seen him then. He also said that he knew all the victims. Murali was his uncle, Raguram and Boy were Murali's friends. Moreover, Pragash, SP2 and Boy had studied at the same secondary school and he knew him from then.

[32] In the course of examination in chief and cross-examination, Pragash, SP2 was asked to make various markings on the sole picture of the area where the killings were said to have taken place, ie on exh P5 and on a sketch plan, P6. On the photograph, P5, Pragash marked a point 'X' as being the place where Murali's neck was slashed by Lobo. The point 'X' is on the road between the wall-less tent like structure and the temple. He also showed by the mark 'Y' where he was positioned in the tent. On P6 he also marked 'X'. However the point 'X' in P6 does not match the point 'X' in P5. It is not clear whether Pragash, SP2 understood fully the sketch plan, given that he was not asked whether he understood it in full. Further SP2 was only educated up to the level of Form 2. His markings on the sketch plan may well not be accurate because his comprehension of the sketch plan was not clear. More significantly however, the entire area where these events took place is a relatively small area. Accordingly the different markings do not denote a great distance apart.

The evidence of Satis a/l Krisnan, SP4, in respect of the events on the night of 18 September 2004 and the early hours of the morning of 19 September 2004

[33] Satis a/l Krisnan was sixteen years old when he gave evidence at this trial. He was aged thirteen at the time of the incident. In the course of submissions at the close of the prosecution case, counsel for the third accused, Sivan, submitted that the evidence of this witness should not be accepted in toto, as the court had not treated his evidence as that of a child. In short that it had not been ascertained whether he understood the meaning of an oath and the difference between truth and falsehood. This issue, had not, of course been raised at the time when Satis, SP4 gave evidence.

[34] At the time when Satis, SP4 gave evidence in this court, he had commenced working as a security guard having dropped out of school after Form 2. He did not appear to fall into the category of a 'young child' who had difficulty understanding what court proceedings were about. It must be pointed out that he was not thirteen years old when he gave evidence; he was thirteen at the time of the incident. While the fact of his youth may well have bearing on the extent of his recollection and the weight to be accorded to his

evidence, this did not detract from the fact that he clearly did not require any caution or ascertainment as to whether he understood truth from falsehood, or the meaning of the oath. He undoubtedly understood the purpose of the oath and gave very detailed evidence in respect of all three incidents resulting in the deaths of Raguram, Murali and Boy; he was moreover subjected to the greatest amount of cross-examination by all three counsel for the accused and notwithstanding this was able to answer the questions posed. Moreover, he was one of the few witnesses who appeared to comprehend the sketch plan and could correlate it to the photograph, exh P5. Accordingly I was unable to accept the submission by counsel for the third accused that Satis, SP4's evidence should be wholly disregarded.

[35] Satis, SP4 testified that on the 18 of September 2004 he was at the wedding dinner from about 7pm to 9pm. He then left for the the Mariamman temple at by motorbike. According to him, Murali, Raguram, Boy, Pragash and Dhatchinamoorthy, SP5 were all present in the vicinity of the temple. He first performed his prayers and then watched the drummers playing their drums inside the temple. He however stood outside the temple where he could both see and hear the drums. People were dancing in front of the temple.

[36] Satis, SP4 gave evidence that he was then informed by Murali that the chariot and procession was about thirty metres away. He, Murali, Satisgopal, SP3, Pragash, SP2 and Dhatchinamoorthy, SP5 were all distributing food to devotees from the tent. Between 11.55pm and 12.20am people were dancing directly opposite or in front of, the entrance to the temple. Satis, SP4 also gave evidence that he saw Lobo, Bontal and Sivan about ten minutes before the incidents at the side of the Mariamman temple. From the sketch plan, exh P6 and the photograph P5 (A) as well as Satis, SP4's evidence in the course of examination in chief and cross examination, it appears that Satis, SP4 was in the tent but facing the road along which the procession would proceed; he had his back to the tent and was facing outwards. The temple and the area immediately in front of the temple where the incident took place were therefore behind him and to his left, (see p 128 of the notes of evidence. By 'front of the tent, this witness means the side facing the road along which the procession would pass; not the front of the temple. So, when the fight started, he was at 'F' with his back to the tent, which he called the front of the tent. He was facing outwards and therefore would have to look backwards and sideways to see what was going on at 'g' where people were dancing). Satis, SP4 gave evidence that there was light that night from the lamps in the Mariamman temple, from the flats as well as the coloured lights strung at the top of the tent. He was therefore able to perceive events clearly.

A [37] Satis, SP4 turned his head sideways and behind to watch the group of people who were dancing in front of the Mariamman temple. Raguram was dancing there too. It was at this time that he saw that a fight had erupted. His evidence was that he then saw Lobo hitting Raguram. After that, Lobo placed his hand on Raguram's shoulder and stabbed him with a knife in the chest. B Then, Lobo jumped and stabbed/wounded/injured Raguram in the neck and slashed his face. Satis, SP4 then clarified that at the beginning he could not see clearly and therefore did not realise that Lobo was holding a knife in his hand, and it therefore looked like Lobo was hitting Raguram. When he could see more clearly he perceived/observed that Lobo had a knife and was C stabbing Raguram in the region of his chest. When Lobo stabbed Raguram's chest, Satis, SP4 realised he, Lobo, had a knife. The witness was behind Murali. Then Satis, SP4 said some people held his shirt and pushed him to the ground. When he looked behind him he saw Murali holding his neck with his hand. Murali was about three metres away. When Murali took his D hand away from his neck, blood flowed from his neck. After a few steps, Murali fell. Boy who was a short distance, about 1.5 metres away from Murali ran in Murali's direction and tried to break his fall to the ground by attempting to hold him. Sivan, the third accused at this point came towards Boy and told Boy: 'Why are you holding Murali?' Sivan then pushed Murali E on the shoulder, such that Murali was pushed aside. He then stabbed Boy in the chest. Satis, SP4 maintained that he saw the sharp point of the knife which was about 10 inches long enter Boy's chest. He viewed this incident from a distance of about three metres.

F [38] According to Satis, SP4 the knife that was lodged in Boy's chest couldn't easily be removed. Sivan turned the knife in Boy's chest and then withdrew the knife from Boy's chest. Lobo then said to Sivan, 'come on, let's get out of this place'. Lobo and Sivan attempted to run away. SP4, Satis says that he, Satisgopal, SP3 and Dhatchinamoorthy, SP5 then tried to catch G them to prevent them from running away. Bontal then pushed Satis, SP4 to the ground. As he rose, he saw that Sivan and Bontal were standing there. Satisgopal, SP3 went near Sivan to catch him. Sivan used his helmet to hit Satisgopal, SP3 who avoided his attack. Satis, SP4 then said that he went to the tent and watched from within the tent-like structure, the fight outside. H When he came out of the tent, Bontal held his shirt and tried to hit him. He pushed Bontal who fell to the ground. After this, according to him, everyone ran away. Then Pragash, SP2 and others carried Murali. SP4, Satis was by Pragash, SP2's side. Satis, SP4 says he took off his shirt to stem the flow of blood from Murali's neck but this was insufficient to do so. Vivek also gave I his shirt to Murali's brother, Mothi, SP6 to staunch the blood flow. SP4, Satis then says he went over to where Boy was lying to assist there.

[39] He saw Satisgopal, SP3 holding Boy's head. SP3 asked him to pull up Boy's shirt a little to look at the stab wound because there was no blood on Boy's chest. They saw a wound to Boy's chest which was bleeding slightly. Satisgopal, SP3 asked Boy to speak. Boy took three breaths and after the third breath stopped breathing altogether. Satis, SP4 and Satisgopal, SP3 put Boy into the ambulance. Murali they placed in their friend, Vivek's car. Vivek, SP12, Mothi, SP6 who is Murali's brother and a person unknown to Satis, SP4 took Murali to the hospital. As for Raguram he was also placed in an ambulance for onward transportation to the hospital.

[40] On the sketch plan, exh 6, prepared by the police, three areas with traces of blood have been marked out. They are in front of the temple. Satis, SP4 testified that there were blood stains in front of the Mariamman temple but no pictures had been taken of this area. No such stains could be noted from exh P5A which was taken from a different angle.

[41] Satis, SP4 then went to the hospital where he learnt that Murali was in a critical state and Raguram and Boy had died. He then went on to the police station in Klang. He recalled that Pragash, SP2 went with him to the police station where they were questioned by the police. Satisgopal, SP3 and Dhatchinamoorthy, SP5 also made police reports that night. Subsequent to that night an identification parade was held, and Satis, SP4 identified Lobo, Bontal and Sivan. Satis, SP4 clarified that he had seen Lobo prior to the incident on 19 September 2004, but had not spoken to him. He had seen Lobo at the car wash near the edge of the river during a period of about one month prior to the incident. He knew Sivan for a period of about three months before the incident. This was through Satisgopal, SP3, as Sivan was often at Satisgopal's grandmother's house. This was the house where the wedding dinner was held on the 18 September 2004. Satis, SP4 also knew Bontal, because Bontal's younger brother had been at the same school. As for the victims of the attack, Satis, SP4 testified that he had seen Raguram prior to the attacks. He knew Murali as an 'elder brother' to Pragash, SP2. He also knew Boy for a period of about three months prior to the incident. Boy was a friend of Satisgopal, SP3's, and hence he knew Boy. It was repeatedly put to this witness in various forms by all three counsel for the accused that he did not actually view anything but was merely repeating in court what he had been told to say by Pragash, SP2, or the others. This was vehemently denied by Satis, SP4. He maintained that the incidents had occurred before his very eyes and therefore he could recall what had happened in the hours between 11.55pm and 12.20am, which was his estimation of the time at which these incidents occurred.

The evidence of Datchinamoorthy a/l Kathan ('Thambi') SP5 in respect of the events that occurred on the night of 18 September 2004 and the early hours of the morning of 19 September 2004

[42] Datchinamoorthy or Thambi, SP5 is aged nineteen and works as a security guard. At the time of the incident he was a wiring technician. Murali was Thambi, SP5's cousin brother whom he referred to as 'elder brother' in Tamil. On the evening of 18 September 2004 he attended Baalasantar's wedding dinner at their home from 8pm to 9pm and then went on to the Mariamman temple. He reached the temple between 9pm and 9.30pm. He went with his cousin, Satisgopal, SP3 on his motorbike.

[43] According to him, Raguram, Boy and Murali were already there. Thambi, SP5 gave evidence in relation to the annual procession of the chariot and the fact that a tent would be erected opposite the Mariamman temple and food would be distributed there. He said that the place was bright and he could see clearly from the lights in the Mariamman temple which were sufficient to light up the area. He testified that drums were being played in the temple and that the three accused and one Anbarasu and Sonyrajah were also present. They were standing near the edge of the temple and speaking to each other.

[44] According to Thambi, SP5, Satisgopal, SP3 clapped him on his shoulder and said 'look there, Lobo is dragging Raguram'. He then looked and saw that Lobo had dragged or pulled Raguram and held him close or hugged him with his left hand and stabbed him with a knife, using his right hand. Thambi, SP5 could not recall where precisely he was stabbed, save that it was the front of Raguram's person where the injury was inflicted. He also could not recall whether Lobo hugged Raguram from the front or the back. He could not recall whether Raguram and Lobo were facing each other although he thought they might have been so positioned. To the best of his recollection when he looked, he thought Raguram was facing the Mariamman temple, but he could not be absolutely sure. He was sure however that the stabbing incident took place in front of the Mariamman temple. Thambi said that he was about twelve metres away in front of the tent like structure when this occurred. He was clear that Bontal, Sivan and Anbarasu were also there with Lobo. He saw Lobo stab Raguram once with a 'bennet' knife with his right hand. He described the knife as a 'bennet' knife because he was told by Satis, SP4 that the knife he described was called a 'bennet' knife.

[45] Then Thambi, SP5 observed that his brother went towards the scene of the incident and sought to separate Raguram and Lobo by pulling them apart. Murali pulled Raguram backwards/behind and pushed himself forward. He then saw Lobo placing his knife at Murali's neck on the left side. Lobo said 'don't you interfere' in Tamil. After this he could not recall clearly but says he saw Bontal running behind Murali and Murali holding his neck. He then saw Bontal running away with a knife, but could not tell whether it was the same knife which had been used by Lobo.

[46] When Murali fell, Thambi, SP5's friend, Boy ran to help Murali. Boy held Murali before he fell. Then Sivan, the third accused dragged Murali aside, separating Murali and Boy with his left hand, before stabbing Boy. Sivan's knife was lodged in the centre of his chest. Sivan then turned the knife and removed it from Boy's chest. Then Boy fell backwards. Thambi, SP5 witnessed Boy being stabbed from a distance of about seven metres. He recalled that before the incident, Boy had been standing and then dancing before stabbing Boy. Thambi, SP5 estimated that the three incidents occurred between 11.45pm and 12.30am. He said that Lobo, Bontal and Sivan then fled behind the tent towards the JKR Quarters or flats.

[47] Thambi, SP5 helped to place Boy in the ambulance. He described Boy as being unconscious when he was placed there. There was blood on his body and a little blood on the front of his shirt. He could not recall who helped Murali and Raguram. Thambi, SP5 then went to the house where the wedding dinner had been held. Subsequently he attended an identification parade and identified Lobo, Bontal, Sivan and Anbarasu. He clarified that he identified Anbarasu because he had been standing in the area of the incidents holding a helmet. However he did not witness Anbarasu stabbing or inflicting any injury on either Raguram, Murali or Boy.

[48] Thambi, SP5 knew Lobo for a period of three months prior to the incident through one Thanabalan who lived in a house near Thambi's. As for Sivan, he had been Thambi's neighbour since Thambi, SP5 was twelve years old. He had also seen Bontal when he went to Murali's house in the JKR quarters some two months prior to the incident. He often went to Murali's house and had noticed Bontal in the area. However he denied any enmity with any of the three accused.

[49] It was also put to this witness that he had not actually witnessed any of the incidents but was making the entire story up. This too was denied vehemently by Thambi, SP5 who said that he was present when Raguram was

A stabbed and Murali sought to separate Lobo and Raguram. At the time, he said the drums were playing, then ceased and started up again. He maintained that if he were making up stories he would not know the movements of the various players. His motorcycle which he had used to get to the temple was parked there throughout the occurrence of the killings.

B

Evidence of the pathologist, Dr Khairul Azman bin Hj Ibrahim, SP20 ('the pathologist, SP20')

(i) Post mortem report on the deceased, Raguram

C

[50] The pathologist, SP20 who has conducted more than three thousand post-mortems gave evidence of the injuries suffered as well as the probable causes of death of the three deceased. With respect to Raguram, the pathologist stated that he had suffered multiple injuries which he enumerated as follows:

D

(i) a slash wound to the back of his armpit on the right side;

(ii) scratches at the base and behind the right hand;

(iii) a slice wound to the left of his face that reached the edge of his mouth on the left;

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(iv) a stab wound to the left shoulder measuring 5.3cm;

(v) a wound to the edge of his shoulder measuring 3cm by 2cm with a depth of 7.8cm;

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(vi) scratches to the left shoulder;

(vii) a smooth laceration wound to the front edge of the left base of the shoulder;

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(viii) a stab wound to the chest on the left to a depth of 7cm at the level of the left fifth rib that also injured the heart;

(ix) a slice wound to the right hand between the thumb and pointer finger; and

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(x) a small slice wound to the left finger and the back of his left ear as well as near the ear. It is evident from the foregoing that there was a fight or struggle which resulted in the deceased, Raguram suffering from several injuries to his arms, face and a fatal wound to his heart.

I

[51] An internal examination of the chest cavity showed a collection of 1500ml of blood in the left chest cavity. The deceased, Raguram's lungs were

slightly punctured and there was a stab wound to the front and left of his heart. The pathologist concluded that the cause of death was the stab wound to the heart, which would cause excessive bleeding. The collection of blood in the deceased, Raguram's left chest cavity was caused by the stab wound to the chest on the left. He was of the view that death would ensue approximately fifteen minutes after an injury of this nature. In the course of cross-examination, the pathologist, SP20 clarified that the stab wound appeared to be inflicted from the bottom of the heart upwards. It could possibly also have inflicted directly. He said:

> Tikaman adalah dari bawah jantung ke atas. Boleh ditikam secara terus. Position of heart is such that it could be a direct stab or slightly upwards. When carrying out the post-mortem, the portion of the heart is straightened so it appears to be upwards.

[52] He also ascribed the slice wounds on the deceased, Raguram's fingers to the deceased trying to clutch or grasp the knife. He went on to state that the weapon used on the deceased, Raguram, was thin, sharp and tapering to a point. The basis for his conclusion was that the stab wound was bigger at the front of the heart ie 2cm while at the back it was 1cm.

(ii) Post-mortem report on the deceased, Murali

[53] The pathologist's examination of the deceased, Murali showed that he was bleeding from both nostrils and his mouth. A stab wound had been inflicted to the edge of his neck on the left side. It was shaped elliptically and measured 3.5cm. The wound was directed internally and downwards, and had severed the carotid artery to a depth of 7cm. The swelling in the region of his neck showed blood on the left side of his neck. There was also blood all around the severed left carotid artery. The cause of death was stated to be the severed left carotid artery as a consequence of the stab wound to the left of the neck. The pathologist was of the view that a sharp instrument like a knife had been used to cause the injury. The severance of the left carotid artery resulted in excessive bleeding which could have caused death. In the ordinary course of nature excessive bleeding from a severed carotid artery can cause death. The carotid artery is of fundamental importance in the human body as it transports blood from the heart to the brain. He estimated that death would follow within about half an hour. The pathologist, SP20 also stated that the wound could well have been inflicted from downwards from above the neck downwards and then inside the neck and downwards from the left.

[54] In the course of cross-examination, he explained that the stab injury suffered by the deceased, Murali was inflicted with the knife at a slant. He did not agree with the contention for the defence that by the nature of the stab wound, the person who inflicted it would have to be taller than Murali. He explained that there were many varying positions in which the victim could have been and the manner in which the knife was held and wielded which were consistent with the wounds suffered by the victims as outlined above. As such he could not make definite conclusions with any certainty. However he said that even if the deceased, Murali had been standing upright and his assailant had come from behind and stabbed him in the neck, this could have been done using the right or left hand.

(iii) Post-mortem report on the deceased, Boy

[55] The pathologist, SP20 gave evidence that the deceased, Boy suffered the following injuries:

(i) scratches at the end of his elbow on both the right and left sides;

(ii) an 'elliptical' stab wound measuring 2.5cm directed a little inwards, downwards and towards the centre of his chest. The stab wound had entered the chest cavity from the left at the level of the fourth rib and then entered the pericardial sac and injured the heart. It measured 7cm;

(iii) an internal examination showed that the left chest cavity contained 500ml of blood;

(iv) the left rib and cartilage were severed as a consequence of the stab wound;

(v) his left lung was punctured; and

(vi) the stab wound to his heart had penetrated through the outer wall of the front of the heart through to the interventricular wall; in short the stab wound was very deep.

[56] The cause of death, in the pathologist, SP20's view was the stab wound to the heart. He said that such wound could be caused by a sharp instrument such as a knife. In the ordinary course of nature such an injury to the heart could cause death in that the deceased would lose a considerable amount of blood and could also cause the heart to stop abruptly. In the case of the deceased, Boy, he was of the view that both could have occurred. The chances of surviving such injury are narrow as the bleeding is fast.

[57] In the course of cross-examination, the pathologist, SP20 further clarified that the position of the knife was slanting when the injury was inflicted and that it was directed medially into the chest and downwards. He explained that the assailant could inflict such an injury on the victim from the front. He also clarified how it could also have been done from the back and with either hand.

[58] When asked whether the wound would be different if the knife had been plunged into the chest and twisted before being withdrawn, the pathologist, SP20 explained that this would depend on the degree to which the knife was turned. If it was turned slightly, this would not make any significant difference to the wound, but if it were turned significantly more, then the wound would have a 'fish-tail' appearance. He was of the view that the knife had been plunged and withdrawn in the same position. When he was referred to the photographs of the wound however, he opined that the effects of turning or twisting the knife may or may not appear. He explained further that it was possible that the effects might not appear because the heart hangs within the chest cavity and can move to the right or the left in accordance with the movement of the knife. In short the heart is not in a fixed position, and even if the knife had been twisted this might not show itself by way of a fish-tail appearance on the wound because the heart would have moved with the twisting of the knife, thereby precluding the formation of a fish-tail appearance that would more readily be visible where the object that is stabbed is stationary.

Evidence of the other salient witnesses

[59] Mothi a/l Peragasamy, SP6 who is Murali's brother gave evidence pertaining to events prior to and after the incidents. He did not witness the infliction of injuries on the victims. His evidence corroborated that of the four eyewitnesses in so far as the wedding dinner was concerned. He had traveled to the temple (the Maha Mariamman temple) with Murali by lorry that night. He confirmed that food was being distributed and he went further afield to distribute food, well away from the tent. Then he said he heard the sounds of people fighting and screaming, whereupon he became scared and ran away. As he did so, he noted that people were all scattering and running away from the temple area. He said that he saw that his brother (had been/being) slashed and falling to the ground. He ran away to the area of the JKR quarters and hid there until the crowd lessened when he ran back to where his brother was lying. He helped to place him in a vehicle and accompanied Murali to the hospital.

[60] Sivam a/l Muniandy, SP7 was also at the temple that night after 11pm. He too stated that while food was being distributed and coconuts arranged at the front of the tent for offerings to be made, a fight broke out. According to him, Murali was helping him with the arrangements when Murali left and went to the area behind the tent. This would be the area near the front of the temple. Murali returned holding his neck and saying 'help me, Sivam'. Sivam stated that the injury was on the right side of Murali's neck although in fact, Murali was stabbed on the left side of his neck. Sivam, SP7 then said that he took off his shirt and wrapped the wound and set off to look for a vehicle to transport Murali to the hospital. He recalled Mothi, SP6 being present. Eventually he, Mothi, SP6 and Vivek, SP12 took Murali to the hospital in Vivek's car.

[61] Vivekanandan a/l Kuppusamy, SP12 gave evidence that he was present at the Maha Mariamman temple from 8pm that evening. He confirmed seeing, Pragash, SP2, Satisgopal, SP3, Satis, SP4 and Murali prior to the killings that night. He did not witness the fight that night, but could recollect people running away. He was then called upon to help and he assisted to lift and place Murali in his car, a Proton Saga and driving him to the hospital.

[62] Anbarasu a/l Thangavelu, SP13 who is a friend of the second accused, Lobo, was present at the scene that night. He was in fact sought to assist in inquiries by the police and surrendered himself into their custody after the events of 19 September 2004. He was kept in remand for some time, and subsequently released by the police. He said that he went to the temple fairly early with his family, then left them at a relative's house and returned to the temple at about 9.30pm. He returned, according to him, with Lobo, his younger brother and many other young men. He gave evidence that he saw people dancing in the area near the temple and after a few minutes a fight broke out. According to him he was standing near the JKR quarters. When the fight broke out, he ran to the Maha Mariamman temple. He could see the fight going on about 30–35 feet away. He then ran away to the Vinayagar temple, where he had parked his car, and went home. He gave evidence that Lobo, his younger brother, Rajah, and several others were involved in a fight. His younger brother, known as Sonyrajah died about a year ago.

[63] In this context it is relevant to note that none of the victims possessed a knife or weapons of any kind.

[64] This then summarises the evidence of the witnesses who were present that night.

The investigation

[65] Several witnesses were called to give evidence of the investigation that was carried out. Of these witnesses, the evidence of the investigating officer, ASP Othman bin Che Senik, SP21 ('the IO') is the most pertinent. He outlined the steps taken throughout the course of the investigation. He explained how he took photographs at the scene of the incident, drew a sketch plan, sought witnesses, took statements from the eyewitnesses who identified the assailants, sent samples to the Chemistry Department, organised an identification parade, remanded up to nine suspects and then charged three of those suspects after ascertaining that the others were not involved in the incidents resulting in the deaths of the three victims.

[66] A perusal of the evidence will show that the investigation was somewhat lacking in that the IO:

(a) failed to take a sufficient number of photographs of the scene of the incident;

(b) there were three large bloodstains or pools of blood which have been marked out on the sketch plan, exh P6, but photographs of the same were not taken;

(c) neither did the IO take a swab or sample from each of the three different blood stains; he only took a sample from one of the three. This was subsequently found to be Murali's blood;

(d) he only expended half an hour in total at the crime scene on the night of the incidents, as a consequence of which the sketch plan was lacking in particulars;

(e) the IO stored the samples of blood taken from the victims in his office without refrigeration, thereby facilitating the decomposition of the samples. These decaying or ruined samples were subsequently sent to the Chemistry Department for analysis. As a consequence the results were of decaying or decomposing blood and the accuracy of such findings were thereby put in issue; and

(f) the identification parade that was conducted was shoddily carried out; the documentation contained several errors. In this context, the fact that the four eyewitnesses knew the assailants prior to the incidents and were therefore able to identify them even without an identification parade, alleviated the fundamental errors that arose in the conduct of the identification parade.

[67] The flaws in the investigation process, although material, did not serve to defeat the evidence of the witnesses who were present at the scene of the

incident on the 19 of September 2004. The IO gave clear evidence that although nine suspects were initially detained, only the three accused were charged because the eyewitnesses in their statements to the police clearly identified the three accused as the persons involved in inflicting the injuries on the three victims. The others were present at the scene.

[68] Zaraiha bt Awang, SP19 ('the toxicologist'), from the Toxicology Division of the Chemistry Department, Malaysia gave evidence that the samples of blood taken from the three victims contained levels of alcohol well above the normal level. She concluded that the three victims were intoxicated. However as against this, she also confirmed that the levels of alcohol found in the blood samples taken from the deceased could to some extent be caused by the decomposition of the samples as a consequence of their not having been stored at a temperature of or below four degrees centigrade. In summary the toxicologist concluded that the three victims were intoxicated.

[69] The foregoing provides an overview of the evidence of the salient witnesses.

BURDEN OF PROOF ON THE PROSECUTION AT THE CLOSE OF ITS CASE

[70] As prescribed by s 180 of the Criminal Procedure Code, the duty of the court at the close of the prosecution case is to consider whether a prima facie case has been made out against the accused. If a prima facie case has not been made out the court is bound to record an order of acquittal, while if it has been made out on the offence charged, the court is bound to call upon the accused to enter on his defence. In the instant case, the court is bound to consider whether a prima facie case has been made out against each of the accused in respect of the charges brought against each of them.

[71] In order to ascertain whether a prima facie case has been made out against each of the three accused persons, the evidence raised in the course of the prosecution case will have to be maximally evaluated. The duty of the court to undertake a meticulous examination of the evidence is independent of the issues raised by the defence, although the court is inevitably bound in the course of such examination to consider the numerous issues raised. The purpose of undertaking such an evaluation is to test the credibility of the prosecution's witnesses and to ensure that all the requisite ingredients of the offence have been made out. This in turn requires a thorough examination of the evidence as opposed to a mere cursory review, acceptance and reproduction of the evidence.

[72] The test to be adopted in determining whether a prima facie case has been made out has been clearly enunciated in, inter alia, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 and in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 where the Federal Court held:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by rebuttal evidence. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* 11th Edn as:
>
> A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that if unrebutted, it is sufficient to induce the court to believe in the existence of the facts as stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established... The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.
>
> As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage be properly described as a case that has been proved beyond reasonable doubt...

[73] A thorough examination of the evidence adduced during the course of the prosecution case is therefore undertaken below. For the purposes of dealing most expeditiously with the considerable quantity of evidence in this case, and given the chronology of events as they occurred, it is most appropriate to deal with the charges against the second accused, Lobo first, the third accused, Sivan next, and finally the first accused, Bontal who is alleged to have conspired to aid and abet in the murders of Raguram and Murali.

Was a prima facie case made out against the second accused, Lobo?

[74] The charge against the second accused, Lobo has been set out above. The prosecution submitted that in this case it relies upon the third limb of s 300 of the Penal Code to prove murder. The relevant portion of s 300 of the Penal Code, namely s 300(c) reads as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or... Thirdly — If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

[75] It is incumbent upon the prosecution to prove the following ingredients/elements in respect of each of the charges against the second accused, Lobo, whereby he is charged with the murder of first, Raguram and secondly Murali:

(1) that Raguram and Murali are dead;

(2) that Raguram and Murali each died as a result of injuries sustained by them;

(3) that the injuries of Raguram and Murali were caused or were the result of the act of the second accused, Lobo; and

(4) that in inflicting the injuries upon Raguram and Murali, the second accused, Lobo either:

(a) caused the injuries with the intention of causing death; or

(b) ...;

(c) caused the injuries with the intention of causing bodily injuries and the bodily injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death, (see *Sainal Abidin bin Mading v Public Prosecutor* [1997] 4 MLJ 497).

Elements (1) and (2): Raguram and Murali are dead and died as a result of injuries sustained by them

Element (1): Raguram and Murali are dead

[76] The fact that Raguram and Murali are dead is proven by the evidence of their next of kin who identified them after death, as well as the evidence of the pathologist, SP20 who carried out post-mortems on both Raguram and Murali.

[77] With respect to Raguram, his brother, Sivaram a/l Shandeveloo, SP16 gave evidence that his brother was dead by identifying a photograph of Raguram in exh P8 which comprises a part of the post-mortem report. In Murali's case, his brother, Mothi, SP6 testified to this fact by also identifying Murali from a picture taken of him in exh P7. Finally the pathologist, SP20 confirmed that he had sighted and carried out post-mortems on the two deceased men, Raguram and Murali. This ingredient is therefore proven beyond doubt.

Element (2): Raguram and Murali died as a result of injuries sustained by them

[78] It is also beyond dispute that Raguram and Murali died as a consequence of the injuries sustained by them. In the case of Raguram, the pathologist SP20 has clearly set out that the most probable cause of death was the stab wound to the heart resulting in excessive bleeding and eventual death within a space of about 15 minutes (as set out above). As for Murali, the pathologist, SP20 concluded that the probable cause of death was the slash wound to his neck resulting in a severed carotid artery (as set out above). That these were the causes of death of the two deceased men was neither challenged nor successfully disputed by the defence. As such the second element or ingredient is satisfied.

Element (3): That the injuries of Raguram and Murali were caused or were the result of the act of the second accused, Lobo

[79] The third element requires the prosecution to prove that the second accused Lobo was the one who inflicted the injuries on Raguram and Murali, which eventually resulted in their death. This element or ingredient is vehemently/rigorously disputed by the defence. It comprises the crux of the matter in this case.

[80] In order to prove this element of their case, the prosecution relied on the eyewitness accounts of Pragash, SP2, Satisgopal, SP3, Satis, SP4 and Dhatchinamoorthy or Thambi, SP5. Their evidence, taken as a whole, has been set out in some detail above. Learned counsel for the second accused, Lobo, maintains that there are numerous material contradictions in these eyewitness accounts, which he says precludes the conclusion that a prima facie case has been made out by the prosecution. As the salient facts and

A evidence has been set out above, they now have to be tested against the issues raised by the defence as amounting to material contradictions, thereby adversely affecting and destroying the credibility of the accounts given by these witnesses.

B *Eyewitnesses were 'related' to or close friends of the three victims. Does this taint their evidence?*

C **[81]** At the outset, counsel for the second accused submitted that the 'eyewitnesses' in this case were either related to, or close friends of the deceased victims in the case. It was submitted that as this incident occurred in a public place in the midst of a large crowd, there must have been other persons who witnessed the events of the night, yet no such witness was produced by the prosecution to give evidence. Accordingly it was submitted that the evidence of these witnesses should be viewed with some degree of suspicion as they were not 'independent' witnesses, but 'interested' and 'related' witnesses. Their evidence, it was further submitted was a result of their putting forward a version or story that was less the truth than a tale which they had conspired to make up; in short, that these witnesses were lying.

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[82] It is true that the eyewitnesses in this case are all related to Murali, save for Satis, SP4 who was a friend. It is also true that these eyewitnesses all knew the other two victims, Raguram and Boy well, primarily through Murali. Equally however, the eyewitnesses had all either previously seen or knew the three accused. The three accused in turn, knew the three deceased.

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[83] The fact that most if not all, the players knew each other is not unusual because the events took place on an auspicious occasion in the vicinity of all these people's homes or the homes of their relatives, where they along with numerous other devotees had gathered for the night. Therefore the fact that the eyewitnesses knew both the victims and the three accused persons, per se does not automatically mean that their evidence is tainted with bias. In *Balasingham v Public Prosecutor* [1959] MLJ 193 it was said:

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> After all there is no legal presumption that an interested witness should not he believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and in the surrounding circumstances.

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[84] And in the *Law of Crimes* by Ratanlal and Dhirajlal (2nd Ed) at p 1455, the following is said in respect of 'related witnesses':

> 'Related' is not equivalent to 'interested'. The term 'interested' postulates that the person concerned has some direct interest in the result of the litigation such as interest in decree in a civil case or in seeing that the accused is punished. A witness who is a natural one but relative of the victim cannot be termed as interested. Close relationship of witness to the deceased is no ground to reject his testimony if otherwise it is reliable. On the contrary, close relative of the deceased would normally be most reluctant to spare the real assailant and falsely implicate an innocent one (*State v Kalki* AIR 1981 SC 1390).

[85] It should also be borne in mind that the instant case relates to three separate murders. The eyewitnesses were related (some distantly) to Murali. They were not related to the two other deceased, Raguram and Boy, although they knew them. However they variously gave evidence not only of the wounds inflicted on Murali but also on Raguram and Boy. This is a further reason why their evidence simply cannot be rejected outright.

[86] Apart from Satis, SP4 it was queried by the defence why no other witnesses who were not 'related' to Murali were produced. The fact that no other witnesses who the defence would view as 'independent' were produced does not detract from the duty of the court to examine the evidence before it in accordance with established judicial principles. The court could not conclude that because other witnesses who were not related to Murali were not called, the evidence of the eyewitnesses who were related to Murali had as of right to be viewed with suspicion.

[87] Accordingly the evidence of these witnesses was considered, in like manner to that of other witnesses, by ascertaining their credibility and reliability by reference to their evidence, how they fared in the course of cross-examination and a consideration of their evidence in its entirety. The court also considered whether the four eyewitnesses did or could have conspired to give testimony against the three accused persons in this case.

Were there material contradictions in the evidence of the various witnesses such that the prosecution failed to prove that the second accused caused/inflicted injuries giving rise to the death of Raguram?

[88] It was contended by counsel for the second accused, Lobo that Pragash, SP2 had contradicted himself materially in the course of

examination in chief when he initially stated that Raguram was being beaten up by several persons and Murali pulled him away from being beaten; and then later clarified that he did not see who had beaten Raguram. It was contended therefore that Pragash did not know and did not see who had stabbed Raguram in the chest. This court could not agree that there was in fact a material contradiction because:

(a) the fact that Pragash, SP2 saw Raguram being beaten up but could not identify who specifically was doing so, does not mean that Raguram was not beaten up, nor does it suggest the witness was lying; and

(b) as for Pragash, SP2 not seeing who stabbed Raguram, it is evident from the thrust of his evidence that his testimony related to the identity of the person who slashed Murali on the left side of his neck, and not who stabbed Raguram; he did not purport to give evidence pertaining to the stabbing of Raguram.

[89] It was also contended that the evidence of Satisgopal, SP3 contradicted that of Pragash, SP2 in relation to the stabbing of Raguram. Satisgopal stated that Lobo placed his hand on Raguram's neck and dragged Raguram to the edge of the tent and then stabbed him. Here again there is no contradiction because Pragash, SP2 does not give evidence about Raguram being stabbed by Lobo. He only recalls Raguram being beaten, followed by the fact of Murali going in to rescue him and Murali, (not Raguram) then being slashed in the neck.

[90] Next it was contended that Satisgopal, SP3's evidence needed to be viewed with suspicion because he initially said that Lobo stabbed Raguram but later on in the course of his examination-in-chief stated that he saw the knife being pulled out by Lobo from Raguram's chest, presumably thereby implying that he did not see the knife being plunged into his chest. This it was submitted was a material contradiction. In examination-in-chief, Satisgopal, SP3 stated as follows:

A: Lobo letak tangan di leher Raguram dan tarik Raguram ke tepi khemah. Selepas itu dia tikamnya dengan pisau...

And further on in the course of examination-in-chief:

Q: Ada nampak pisau tersebut masuk dada Raguram?

A: Saya lihat pisau ditarik keluar oleh Lobo dari dada Raguram. Saya tidak nampak darah.

[91] This, it was submitted meant that there was doubt thrown on whether Satisgopal, SP3 had witnessed the act of Lobo plunging the knife into Raguram's chest. However earlier on in examination-in-chief, this same witness had actually demonstrated how the assailant, Lobo, held the victim, Raguram round his neck and plunged a knife into his chest. This is how the court recorded his demonstration:

Q: Boleh tunjuk bagaimana dia memegang leher Raguram dengan tangan kiri? (Mr Ayasamy, counsel for the second accused, Lobo offers himself as the victim).

A: (Lobo stood behind the victim, Raguram and used his left arm to hold him firmly around the neck and close to Lobo's body and used his other hand with the knife to stab Raguram in the chest).

[92] It follows from this that the witness did indeed see both the plunging of the knife into Raguram's chest and its withdrawal. Moreover the fact that Lobo was the one who withdrew the knife negates the possibility of some other person plunging the knife into Raguram's chest and Lobo then stepping in to withdraw the knife. Finally in the course of re-examination, Satisgopal, SP3 was asked to clarify this issue whereupon he stated as follows:

A: Semasa menikam dan keluarkan pisau dari dada saya nampak.

Q: Maknanya kamu nampak kedua-dua?

A: Ya.

[93] From a consideration of the entirety of Satisgopal's evidence it cannot be reasonably concluded that the statements highlighted by counsel comprised a material contradiction. To take one statement out of context, compare it with another and then contend that it is contradictory does not amount to a fair or equitable appreciation of the evidence as a whole. As specified in Ratanlal and Dhirajlal's *Law of Crimes*, Chapter XVI, para 200, at p 1446:

> In appreciating the evidence of a witness the approach of the court must be to see whether the evidence of a witness as a whole is reliable and has a ring of truth in it. Once that impression is formed, the court will scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities and evaluate them in its proper perspective. Minor discrepancies on trivial matter not touching the core of the case, hyper-technical approach by taking sentences out of

context here and there not going to the root of the matter would not be proper. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.

[94] Although the plunging in and withdrawal of a knife is not a minor matter, but an issue that goes to the root of the matter, the fact remains that on an assessment of his evidence as a whole, there is no discernible contradiction warranting the rejection of that part of Satisgopal, SP3's evidence.

[95] It was contended that the evidence of Thambi, SP5 and Satisgopal, SP3 differed materially in relation to the manner in which Raguram was held prior to his being stabbed. Thambi, SP5, it was submitted had demonstrated how Lobo held Raguram from behind prior to stabbing him. This in effect is consistent with what Satisgopal, SP3 also described, save that Thambi, SP5 termed the act as a hug while Satisgopal, SP3 described Lobo as having held Raguram around the neck.

[96] Even if the versions of how Raguram was stabbed varied to some extent, it must be expected to be so because in this case all the players were in constant motion. The assailant and his victim were not stationary, but assuming different positions within a very short period of time, a matter of seconds. The point at which each of the eyewitnesses focused on the assailant and the victim would not have been identical. Given this variance in time, it would follow that each eyewitness's recollection and description of the attack would differ in some aspects. The issue is whether these aspects are so material as to render their versions untrue. In the instant case, given the manner in which the attacks were made, namely while both the assailant and the victim were in constant motion, no one position can be deemed to be the only position that they took during the entirety of the stabbing. The situation is quite different from that where the victim is a stationary victim seated in a chair for instance, and the assailant comes up from behind and plunges a knife into a specific part of the victim's body. In such an instance the positions of the assailant and victim would be of pivotal significance. However in the instant case, no one 'frozen' moment can be pinpointed, as the assailant and the victim were moving before, during and after the incident. The likelihood of the eyewitnesses giving identical versions is therefore highly unlikely and might even suggest an element of concoction. Accordingly no material contradiction between the versions of Satisgopal, SP3 and Thambi, SP5 arose.

[97] The evidence of Satis, SP4 was stated to be contradictory for the following reasons:

(a) He had described Lobo stabbing Raguram with his right hand and the knife being inserted or plunged into Raguram's chest, but later on in examination in chief stated that he had seen the knife when it was withdrawn. Again as explained earlier in the context of Satisgopal, SP3 this one line in Satis, SP4's evidence was taken out of context and quoted in an attempt to establish a 'contradiction'. This answer was given in the following context. Satis, SP4 stated that he saw the knife both being plunged in and withdrawn from Raguram's chest. He did not see any blood however. (This is consistent with the post-mortem and medical evidence which showed that the blood had collected in the left chest cavity). He was then asked when he had not seen the blood, when the knife was plunged in or pulled out and his response was 'Pada masa tarik keluar'. This answer has been taken out of context and then utilised in vacuo to suggest a contradiction.

The entirety of Satis's evidence as set out above showed that he was well able to give a full description of events before, during and after Raguram was stabbed with a clear description of precisely how Lobo stabbed Raguram. His evidence was not damaged during the course of cross-examination on this aspect. Furthermore if Lobo was the one who pulled out the knife, it would follow with virtual certainty that he was the one who inserted the knife in Raguram's chest in the first place, given the nature and manner of the stab wound.

(b) It was further submitted that Satis, SP4 was lying because he stated in the course of his evidence that the three killings took place between 11.55pm and 12.20am; then subsequently clarified that it was an estimation and stated at one point in cross-examination that he did not know at what time Lobo stabbed Raguram. However in making this submission, counsel for the second accused did not consider Satis, SP4's explanation in re-examination when he explained that the lawyer had asked him at what time Lobo stabbed Raguram, and he did not know at exactly what time that occurred. But the incident occurred in his estimation between 11.55pm and 12.20am. Again there is no contradiction shown. It is pertinent here that there was no evidence that the witnesses were wearing watches. All the eyewitnesses based their estimation of the time of the incidents on the approximate arrival time of the chariot and procession at the Mariamman temple, which yearly was between 11.45pm and 12.15am. As specified in Ratanlal and Dhirajlal's *Law of Crimes* (2nd Ed) at p 1457:

> Village witnesses — Rural witnesses do not have mathematical idea of time. They do not have watches or clocks and they give timings only from their

A estimates. *The deposition of a witness with respect to time when the occurrence took place cannot be considered to be meticulously precise as if he had noted the time by reference to a watch. He must have considered to have deposed about the time more or less according to his general impression*... (Emphasis added).

B **[98]** The foregoing holds true in respect of the eyewitnesses in this case vis a vis the estimated time of the incidents. Accordingly this does not comprise a contradiction.

C *Should Thambi, SPS's evidence be rejected outright on the grounds that it contains material contradictions?*

[99] Counsel for the second accused contended that Thambi, SP5's evidence ought to be rejected outright because he could not remember D various details of the incident, thereby suggesting that he was lying. The specific complaints related to the fact that he could not recollect whether other persons had stabbed Raguram, although he was clear that Lobo had stabbed Raguram once; that he could not recollect whether there was blood on Raguram's chest and the manner in which Raguram stabbed Raguram. A E reading of the entirety of Thambi, SP5's evidence however will show that he described the stabbing of Raguram thus during examination in chief:

A: ... Raguram berjalan di tepi khemah ke arah kuil Mariamman. Raguram berdiri di depan khemah. Selepas itu dia berjalan ke arah kuil F Mariamman, untuk buang air kecil. Lobo tarik Raguram dan memeluk Raguram dan tikam dengan menggunakan pisau. Saya tak dapat ingat tikam di mana. Ditikam di depan bahagian Raguram.

Q: Semasa Lobo memeluk Raguram, di hadapan atau belakang?

A: G Saya nampak sewaktu memeluk tetapi tak dapat ingat dari arah mana Lobo memeluk Raguram.

Q: Semasa peluk dan tikam bahagian hadapan, muka Lobo di hadapan atau di belakang?

A: H Pada pandangan saya, Raguram dan Lobo berhadapan. Saya tak dapat ingat.

Q: Semasa Lobo memeluk dan tikam Raguram, awak di mana?

A: Saya berada di hadapan khemah.

I Q: Siapa lagi yang berada dengan Lobo?

A: Bontal, Sivan dan Anbarasu ada di situ dengan Lobo.

Q: Berapa jauh kedudukan Sivan, Bontal, Anbarasu dan Lobo?

A: Pada masa itu gendang telah dimainkan. Bontal, Sivan dan Anbarasu pula sedang menari. Mereka dekat dengan tempat di mana kawasan tikaman terjadi. Jarak ialah lebih kurang tiga meter.

Q: Ada orang lain tikam Raguram?

A: Saya tak dapat ingat.

Q: Berapa kali awak nampak Lobo tikam Raguram?

A: Sekali. Saya tak dapat ingat yang lain.

Q: Lobo tikam Raguram dengan apa?

A: Pisau Bennet. Warna saya tak ingat.

Q: Kamu ingat agak-agak berapa panjang?

A: Tak ingat.

Q: Lobo pegang pisau dengan tangan kanan atau kiri?

A: Tangan kanan.

Q: Adakah kamu nampak darah dari dada Raguram?

A: Saya tak berapa ingat.

Q: Bagaimana cara Lobo menikam Raguram?

A: Saya tak dapat ingat.

Q: Selepas Lobo menikam Raguram, apa terjadi kepada Raguram?

A: Abang saya pergi ke arah tempat kejadian dan meleraikan Raguram dan Lobo dan menarik mereka. Nama abang saya Murali. Selepas itu saya nampak Lobo meletakkan pisau di tempat leher Murali dan kata 'awak jangan campur tangan'...

And in the course of cross-examination:

Q: Apakah yang telah membuat kamu melihat ke tempat di mana Raguram ada?

A: Oleh kerana itu Satis, SP4 dan Satisgopal, SP3 ada dengan saya. Satisgopal, SP3 yang memberitahu kepada saya dengan menepuk bahu saya dan kata 'tengok di sana, Lobo menarik Raguram'. Pada masa itu saya lihat ke arah itu.

Q: Pada masa kamu melihat adakah Lobo menarik Raguram seperti dikatakan?

A: Tarik dan memeluk leher Raguram.

Q: Setuju pada masa itu awak masih dalam khemah?

A: Tidak setuju. Saya di luar khemah.

Q: Pada masa Raguram ditikam, Raguram menghadap ke mana?

A: Waktu saya melihat, nampaknya seperti Raguram menghadap ke kuil, tetapi saya tak berapa ingat.

Q: Adakah kuil itu Kuil Sri Mariamman?

A: Ya.

...

...

Q: Dan kamu kata Raguram menghadap ke kuil Mariamman? Mana Lobo menghadap?

A: Saya hanya dapat ingat Raguram menghadap ke kuil Mariamman tetapi tidak ingat di mana Logo menghadap. Tetapi sesungguhnya berada di depan kuil Mariamman.

Q: Berapa jauhkah Raguram telah ditarik sebelum ditikam?

A: Sewaktu saya melihat selepas diberitahu oleh Satisgopal, SP3 Raguram nampak ditarik dekat-dekat dan peluk di leher.

Q: Kamu kata ditarik. Di bahagian mana Lobo tariknya?

A: Tangan kiri digunakan untuk memeluk. Mr Ayasamy (counsel for the second accused, Lobo) offers himself for purpose of demonstration. (Witness shows how Lobo pulled and held Raguram by the neck).

A: Pisau yang digunakan, digunakan dengan tangan kanan.

And further on where it was put to him that he did not actually witness this incident the witness disagreed.

Q: Saya cadangkan dalam kedudukan Raguram yang menghadap ke kuil Mariamman kamu sudah pasti tak dapat lihat tikaman di depan Raguram?

A: Saya tidak setuju.

Q: Saya cadangkan kamu tidak melihat kejadian Raguram ditikam? A

A: Saya tidak setuju.

Q: Saya cadangkan sekiranya awak tengok Raguram ditikam awak pasti ingat pisau yang digunakan.

A: Saya setuju. Saya nampak pisau tetapi tidak ingat semua secara keseluruhan. B

Q: Kamu tidak pasti tentang saiz dan jenis pisau kerana kamu tidak lihat kejadian Raguram ditikam.

A: Saya tidak setuju sebab saya nampak Raguram ditikam oleh Lobo dan oleh kerana sudah lama, saya tidak ingat jenis pisau tersebut. C

[100] An overall reading of Thambi, SP5's evidence coupled with his demeanour in court shows that this witness gave evidence of such parts of the incident that he could recall. He was clear about the act of stabbing and was able to demonstrate how Raguram was held by Lobo. Taken in totality, it can not be reasonably concluded that because certain details could not be recollected, this witness had concocted seeing the incident and ought to be disbelieved outright. His description and depiction of the events was not a copy of the other witnesses' evidence and contained sufficient detail to show that he was not concocting his entire testimony as was suggested. In this context, the Supreme Court of India in the case of *Bharwada Bhoginbhai Hirjibhai* AIR 1983 SC 753, laid down clear principles relating to omissions, contradictions and minor discrepancies which do not go the root of the matter and shake the basic version of the prosecution: D E F

(1) By and large, a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. G

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details. H

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. I

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimate by guess work on the spur of the moment at interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the eyewitness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him — Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

[101] The foregoing 'rules' are particularly pertinent in the context of this case, where the eyewitnesses are all young men with ages ranging from sixteen to the early twenties. These witnesses were moreover educated up to the level of form two or three at the most. In some instances they could not read properly and most of them could not comprehend the sketch plan, exh P6. Despite this they strove to answer the battery of questions put to them during the course of cross-examination. The defence primarily sought to prove that these witnesses had conspired and concocted the versions of these attacks by the assailants, as they were related to, or friends of the second deceased, Murali. Given the answers of these witnesses during cross-examination and their evidence as a whole, their basic version of the events of that night were incontrovertible. There were omissions and discrepancies, but these did not go to the root of the matter; they in fact, discounted the possibility of concoction as held out by the defence.

Should the evidence of Satisgopal, SP3, Satis, SP4 and Thambi, SP5 be rejected outright on the grounds that their evidence as to the direction from which Raguram was stabbed differs?

[102] It was next contended that the evidence of Satisgopal, SP3, Satis, SP4 and Thambi, SP5 with regard to the direction from which Raguram was stabbed was contradictory, and accordingly their evidence as to Lobo stabbing Raguram should be rejected in toto.

[103] As stated earlier, Raguram and his assailant were both continually in motion during the point in time when Raguram was stabbed. It will be

recalled that evidence was given of Raguram dancing, the sounds of a fight, the account of more than one eyewitness that Raguram was beaten followed by Lobo pulling Raguram and stabbing him. At no time were these players stationary. Neither did all the eyewitnesses focus their attention on the incident at exactly the same moment. This must be coupled with the fact that the incident in question took place in the midst of a crowd approximately three years ago. Given all these factors, it is simply not possible nor probable that the eyewitnesses would give exactly the same descriptions of the positions of Raguram and Lobo throughout the incident.

[104] However, both Satisgopal, SP3 and Thambi, SP5 demonstrated similarly how Lobo held Raguram and stabbed him as set out above. Satis, SP4's version differed slightly:

A: ... Saya toleh ke belakang. Saya nampak Lobo memukul Raguram. Selepas itu Lobo memukul Raguram. Selepas itu Lobo letak tangan di bahunya dan menikamnya dengan pisau dan juga menikam Raguram di leher dan potong ('slash') di muka...

Q: Boleh cerita satu-satu apa yang dilakukan oleh Lobo?

A: Semasa saya menoleh Lobo sedang menari. Dia letak tangan di bahu Raguram dan menikam dia di bahagian dada. Lobo lompat dan tikam Raguram di bahagian leher. Lobo potong muka Raguram.

Q: Sebelum itu kamu kata Lobo pukul Raguram.

A: Pada mula-mula saya tak nampak dengan jelas Lobo memegang pisau ditangannya oleh sebab itu saya nampak seperti dia memukul Raguram. Selepas itu baru saya tahu Lobo mempunyai piasu dan menikam Raguram di bahagian dada.

Q: Boleh tunjuk kepada mahkamah bagaimana Lobo memegang bahu dan menikam Raguram di dada.

A: Witness shows how Lobo purportedly held Raguram by the shoulder and stabbed him in he centre of the chest. Then jumped at him again and slashed Raguram's neck and his cheek.

Q: Muka Raguram menghadap muka Lobo?

A: Ya.

Q: Berapa jauh kedudukan you dari tempat Lobo menikam Raguram?

A: Lebih kurang tujuh meter.

Q: Ada tengok pisau yang dipegang oleh Lobo?

A: Ya.

A Q: Boleh bertiahu berapa panjang pisau tersebut?

A: Lebih kurang 22cm or 9 inci.

Q: Berapa kali Lobo menikam Raguram di dada?

B A: Satu kali.

Q: Ada kamu nampak pisau yang di gunakan oleh Lobo susuk ke dalam Raguram?

A: Saya nampak.

C Q: Ada nampak Lobo tarik pisau dari dada Raguram?

A: Ya, saya nampak.

Q: Ada kamu nampak darah?

D A: Tidak saya tidak nampak darah.

Q: Bila tak tengok, bila masuk pisau atau tarik keluar?

A: Pada masa tarik keluar.

E Q: Semasa Lobo memegang bahu Raguram dan menikam Raguram adakah Raguram buat apa-apa?

A: Ya, Raguram cuba menolak Lobo.

Q: Adakah dia berjaya menolak?

F A: Tidak.

Q: Semasa itu ada kamu nampak ada Raguram memegang apa-apa?

A: Tidak memegang apa-apa benda.

G And Satis, SP4 maintained this during cross-examination too:

Q: Awak kata hanya toleh kepala bukan badan. Kamu kata nampak Lobo memukul Raguram. Rujuk P6. Bagaimanakah kedudukan Raguram semasa dipukul?

H A: Raguram di kawasan bertanda 'g' menghala ke sudut di bawah sebelah kanan. (downwards and to the right hand corner of the Mariamman temple, which is consistent with the other witnesses). Badan dia menghala ke sudut itu juga.

I Q: Bila kamu toleh dan melihat adakah semasa Lobo memukul atau menikam Raguram?

A: Semasa saya toleh ke belakang saya nampak macam Lobo memukul Raguram dan kemudian saya tahu dia memegang pisau di tangannya dan menikam Raguram di bahagian dada.

[105] Satis, SP4 therefore described Lobo as having held Raguram by the shoulder when Satisgopal, SP3 and Thambi, SP5 described Lobo as having held Raguram tightly at the neck or in a hug. It does not follow from this that all the three versions are materially different. As Raguram and Lobo were constantly moving the perception of each witness may well have differed to some extent. But the underlying thread of commonality in all three versions is that Lobo held Raguram to him and stabbed him in his chest with a knife.

[106] It was also contended that Satis, SP4 said that Lobo held Raguram by the shoulder and was facing him when he was stabbed while Pragash, SP2 stated that Lobo stabbed Raguram from behind, holding his neck with the left hand. This evidence is to be considered in the context of the fact that the victim and assailant, particularly the assailant was in constant motion. He did not at any time stop or remain stationary or immobile. His movements would have altered within seconds from one position to another. It is therefore not possible to conclude simply by relying on one or another eyewitness's account of the players' positions that there are material contradictions in their evidence. The eyewitnesses would not have focused on exactly the same object at exactly the same time such that a second by second comparison can be minutely drawn and compared. This is particularly so as Satis, SP4 goes on to state that Lobo went on to injure Raguram's neck and cheek. This in turn is consistent with the injuries reported by the medical expert, the pathologist, SP20. Accordingly Lobo would not have been in any one position for any length of time, but would have moved rapidly from one position to another. As such the evidence of the eyewitnesses as to Lobo's stabbing of Raguram cannot simply be rejected outright. The variations in the evidence of Satisgopal, SP3, Satis, SP5 and Thambi, SP5 in relation to this issue appear to be 'discrepancies' which can be attributed to the matters set out above.

[107] In this regard the judgment of Abdul Hamid J (as His Lordship then was) in *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63 is wholly relevant:

> ... Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies. Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies and say whether they are minor serious discrepancies. If after considering them... On the

A other hand if a magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them. On the other hand, if a magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully I arriving at the truth...

B

[108] In view of the other surrounding details that these witnesses were able to set forth in their evidence, in relation to matters before, during and after Lobo stabbed Raguram, particularly in relation to the other two C incidents that followed almost consecutively after Raguram had collapsed, it appears to be highly unlikely that these witnesses could have concocted their stories so closely, yet differing in some particulars, with a view to 'frame' the second accused, Lobo. Given the educational level of these witnesses, at least one of whom cannot read proficiently, it would be difficult for them to D undertake such an elaborate conspiracy to fabricate evidence in court. The detailed cross-examination to which they were subject further precluded the possibility of such fabrication, as did the answers of these witnesses which remained, in totality remarkably consistent. There was also no evidence of any enmity between Lobo and the eyewitnesses. Given these factors, there is E no basis to conclude that Satisgopal, SP3, Satis, SP4 and Thambi, SP5 did not actually see Lobo stabbing Raguram but concocted the entire matter.

What was Raguram doing prior to the fight and his being stabbed?

F **[109]** In similar vein, counsel for the second accused sought to suggest that there were serious material contradictions in the evidence of the eyewitnesses as to precisely what Raguram was doing prior to the fight and his being stabbed. Again this point is answered, as stated above, that no one witness would have viewed Raguram at precisely the same point in time before the G incident. Therefore Pragash, SP2 said that he saw Raguram dancing in front of the procession before the incident. Satisgopal, said that he saw Raguram standing in front of the tent at some time prior to the fight and stabbing. Satis, SP4 said he saw people dancing in front of the temple prior to the fight and the stabbing of Raguram. And Thambi, SP5 said he saw Raguram H walking past the tent towards the temple, which he assumed to be Raguram going to pass water. These again cannot be contradictions not even discrepancies, because there is no common point in time that formed the basis for the eyewitness's evidence. In short, each of them could have described the various things that Raguram did at different points in time I between 9.45pm and 11.55pm.

The location of the various eyewitnesses

[110] The next issue that was raised by defence in relation to the stabbing

of Raguram was the precise location where this occurred and the location of the various eyewitnesses when they observed the events that night. At the outset it should be borne in mind that the area within which the three incidents occurred is relatively small. It comprises the area in front of the temple, namely a narrow road with a width no more than a few feet, with the erected tent directly opposite the temple. As stated previously the tent has no walls. Perpendicular to the temple and tent is a slightly broader road through which the procession and chariot pass through on its journey to the Selva Vinayagar temple. One side of the tent faces this broader road, and this is where food was being distributed. The evidence of the witnesses is that the three incidents of violence that night took place in the space between the entrance to the Mariamman temple and the side of the tent-like structure facing the temple on the opposite side of the road. The distances between the temple and road and the tent opposite was relatively small.

[111] Pragash, SP2 did not testify that he saw Raguram being stabbed. His evidence was that he saw Raguram being beaten. He marked the area where Raguram was being beaten as 'X' on P5 and 'x' on P6. However the markings on P5 and P6 do not match. While 'V' in exh P5, the photograph, is opposite the Mariamman temple, the marking 'x' on P6, the sketch plan, is on the broader road where the procession would go past. He also later marked the place as where Raguram was lying on P6 with 'R'. Do these markings comprise a contradiction that destroys Pragash's testimony as to the events he did witness? It would not appear so. This witness was not asked whether he understood the sketch plan. He was just told to mark 'x' on the sketch plan. It is not clear whether he therefore understood the sketch plan sufficiently to mark 'x' in the same place as on the photograph.

[112] However, the marking that he made on P5, the photograph, is accurate and consistent with markings made by the other witnesses, as being the scene of the incident. Given the foregoing, the difference between his markings on P5 and P6 cannot be viewed as a material contradiction, especially as this witness is not an eyewitness as to the stabbing of Raguram.

[113] In any event, Satis, SP4 marked the point where he saw Raguram being beaten, as he first thought, before he realised he was being stabbed, as 'g' on P6. 'g' on P6 corresponds to the marking 'x' on P5. This denotes the area in front of the temple. In this context it is true that Satis SP4 stated that the point where Raguram was stabbed could not be seen on P5. Indeed P5 does not accurately reflect the area in front of the temple adequately. And Satisgopal, SP3 in his evidence clearly states that Raguram was initially injured outside the front of the Mariamman temple. Thambi, SP5's evidence is also to the effect that Raguram was stabbed outside and while facing the Mariamman temple. To that extent the evidence of Satisgopal, SP3, Satis,

A SP4 and Thambi, SP5 are consistent with regards to where the incident took place. Pragash, SP2 describes incidents as having occurred outside the tent. If it is considered that the tent is just across from the entrance of the Mariamman temple it is evident that these witnesses are describing the same area, from different perspectives. When it is further considered that the area
B of the occurrence is indeed a small area, the difference in the approximate markings of locations does not amount to a material contradiction. If indeed a witness had marked the event as having taken place near the JKR flats or the Selva Vinayagar temple that would have amounted to a serious discrepancy. In the current context the differences in the markings amount to
C no more than a distance of several feet or yards.

[114] Similar points were raised by counsel for the second accused, Lobo, in relation to the exact location of the eyewitnesses when Raguram was
D stabbed, suggesting that there were contradictions in the markings made by the various eyewitnesses on P5 as compared to P6. However, none of these issues amounted to a material contradiction because the events of that night took place within a small area, such that distance was no bar to visibility; with persons moving constantly such that any markings made on the photograph
E or sketch plan would have been transitory, as both the assailants, victims and even the eyewitnesses were moving. Finally not all of the witnesses, unlike Satis, SP4 were able to correlate the photograph, P5 with the sketch plan. And the photograph, P5 did not provide a clear view of the road in front of the Mariamman temple but focused instead on the tent. Precise markings
F were therefore difficult to pinpoint with complete accuracy.

[115] With respect to Satis, SP4's evidence it was contended that as he was standing just outside the tent facing the road where the procession would proceed, it would have been difficult for him to witness the events as stated
G by him. Satis, SP4 it will be recalled explained that he turned his head sideways and behind, at which point he viewed the sequence of events beginning with Lobo stabbing Raguram. It was contended that as there would have been many people in the tent it was not possible for Satis, SP4 to have seen past them to the area where Raguram was being stabbed. This
H was put to Satis, SP4 who explained that notwithstanding the presence of other persons, saw the injuries inflicted on Raguram. Given the degree of detail and the lack of hesitation in this witness's replies, coupled with the fact that his credibility was not adversely affected during cross-examination when considered as a whole, it is highly improbable that this witness concocted his
I evidence about Raguram and Lobo. It should also be borne in mind that Satis, SP4 did not remain stationary at the point when he turned his head to look at the area in front of the Mariamman temple. He moved forwards to several positions which he readily marked on the sketch plan, P6. There was therefore no reason to disbelieve him.

[116] It was also suggested as both Satis, SP4 and Thambi, SP5 were standing near the tent on the side facing the road where the procession would pass, and Raguram was facing the southeast corner of the Mariamman temple, they could not have seen the injuries sustained by Raguram who was stabbed, inter alia, in his chest. However as stated earlier no one party was stationary and it would be erroneous to adopt an approach whereby the various players are viewed as being immobile or frozen in their positions. The players were in constant motion, whereby their positions changed constantly from second to second. Given the constantly changing positions of Raguram, Lobo, the interplay of Murali after the stabbing, and the positions of the eyewitnesses themselves, it cannot be concluded that the evidence of these witnesses be disbelieved or disregarded in toto as being concocted.

What happened to Raguram after he was stabbed?

[117] Counsel for the second accused asserted that there were contradictions in the eyewitnesses accounts of what had happened to Raguram after he had been stabbed.

[118] Pragash, SP2 gave evidence that Murali's neck was slashed as he attempted to pull Raguram away from being beaten or attacked, although he did not see the person who stabbed or hit Raguram. Satisgopal, SP3 said that Raguram fell to the ground after he was stabbed. And Satis, SP4 said that after Raguram was stabbed he, Satis, called out to Murali to help and Murali went to help Raguram. Thambi, SP5 said that Raguram was pulled away by Murali immediately before Murali's neck was slashed. In essence it was contended that if as Satisgopal said, Murali pulled Raguram's hand but Raguram had been stabbed and fallen to the ground, how could Murali have helped Raguram by pulling him away? This submission is less than clear as there is no apparent contradiction in the events as described by the various witnesses. As specified earlier, the witnesses would have focused on the events, and noted differing matters at different points in time. No two accounts would be identical. In any event a reading of the evidence of these witnesses in toto shows that Raguram was hit, then stabbed and as he collapsed, Murali tried to pull him away by his arm, at which point Murali's neck was slashed. By this time Raguram collapsed to the ground. There is therefore no basis for the assertion of a contradiction in the evidence of these witnesses.

[119] The evidence relating to the injuries inflicted on Raguram resulting in his eventual death, came from Satisgopal, SP3, Satis, SP4 and Thambi, SP5. The evidence of other witnesses did not relate directly to his being stabbed. Each of these witnesses gave evidence which has been both summarised and examined above. Their evidence was consistent in essential aspects, namely that they had seen Raguram prior to the incident, either

walking, standing or dancing in the area in front of the Mariamman temple. The area there was crowded as people were dancing to the sound of drums, awaiting the passage of the procession and chariot. The witnesses in question were all busy distributing or packaging food for distribution to devotees. Most of them made reference to loud noises or the sounds of a fight, and when they turned their attention to the area in front of the Mariamman temple, between the temple and the tent, they saw Lobo hitting or stabbing Raguram in the chest. Satis, SP4 saw Lobo inflict other injuries too. Their description of the precise manner in which Lobo held Raguram as he stabbed him differed to some extent, but in this court's assessment, not materially or so fundamentally as to warrant a rejection of their evidence on this point.

[120] The testimony of these witnesses relating to the injuries suffered is further corroborated by the medical evidence in relation to Raguram's injuries. They all testified that Raguram was stabbed once in his chest. The fact that all of them stated that they saw a lack of blood is consistent with the internal bleeding and collection of blood in the victim's left chest cavity. Their description of the knife was consistent. The description of matters both before and after the incident was consistent as a whole in all these witnesses' accounts. The position of Raguram and Lobo was also consistent given that the area where the incident took place was relatively small. The small area also enabled these witnesses to view events from relatively close distances, although there was a large crowd present that night. After the initial fight and stabbing of Raguram, however, people scattered wildly in all directions to get away, allowing the consecutive events to be viewed more clearly.

[121] Anxious consideration was given by this court to the issue of whether it was likely that these witnesses had conspired to give evidence against the accused persons in an attempt to seek 'revenge' for the death of Murali, to whom many of them were related, and his friends, whom they all knew or were acquainted with. In order to do so it would have been necessary for these witnesses to have memorised the details of numerous events so as to be able to provide the necessary particulars that are specific or unique to a particular event. Counsel for the accused argued that this indeed was the case, as in many instances, the witnesses responded in the course of cross-examination that they did not know or could not remember. Having perused the entire record of evidence several times, and bearing in mind the demeanour and response of these witnesses during cross-examination which was both lengthy and exhaustive, this court concluded that these witnesses were not lying in respect of the material particulars of the case. The reason for this is that their evidence was not, by and large shaken substantially during the course of cross-examination. In fact in some instances, greater detail in relation to the killings emerged in the course of cross-examination. That is not to say that there were no discrepancies. However they were not so major or fundamental

to warrant a rejection of the entirety of the evidence.

THE SECOND CHARGE AGAINST THE SECOND ACCUSED, LOBO RELATING TO THE MURDER OF MURALI

Were there material contradictions between the prosecution witnesses as to how Murali was stabbed?

[122] It was submitted by counsel for the second accused, Lobo that there were numerous contradictions between the evidence of the various eyewitnesses in relation to the injury inflicted on Murali.

[123] First it was stated that there was a contradiction between the evidence of Pragash, SP2 who clearly stated that Lobo slashed Murali's neck from behind, and that of Satisgopal, SP3 who said that an unknown person slashed Murali's neck from behind. A reading of Satisgopal's evidence will show clearly that he did not know the identity of the person who slashed Murali's neck because he could not see him:

Q: Kamu kata selepas Lobo menikam Raguram, Murali pergi menolong Raguram dan menarik tangan Raguram. Kemudian awak kata orang yang tidak dikenali memotong leher Murali. Adakah kamu nampak orang yang tidak dikenali?

A: Tidak.

And later on in his evidence:

Q: Kenapa kamu kata kamu tidak menengok muka orang yang memotong leher Murali?

A: Saya tak nampak muka orang itu.

Q: Mengapa tak nampak?

A: Sebab tempat itu dalam keadaan kelam kabut.

[124] It is therefore evident that Satisgopal, did not see Murali's assailant. It was not his evidence that a person whom he had never seen before slashed Murali's neck. As such there is no contradiction between the witnesses, Pragash, SP2 and Satisgopal, SP3, because one saw Murali's assailant, Lobo, and the other did not.

[125] The next 'contradiction' by Pragash, SP2 was said to arise because he had stated in the course of his evidence that Lobo had slashed Murali from

behind, and Lobo did not hold Murali. Later however the following question was put to Pragash, SP2 by the prosecution:

Q: Adakah Murali melawan pada masa dia dipegang?

A: Tidak melawan.

[126] The witness, Pragash, SP2 therefore merely replied that Murali did not fight back when his neck was slashed. He did not state at any time that Murali was 'held' when his neck was slashed from behind. Again no contradiction arises.

[127] It was also submitted that as there were people around Raguram and Murali went 'into' this crowd to pull Raguram out, SP2, Pragash could not have witnessed Raguram being stabbed and Murali's neck being slashed. This contention is unsound because the issue of whether Pragash, SP2 is to be believed or otherwise is based on an examination and assessment of his evidence as a whole. Moreover the fact of his having witnessed such an incident from a few feet away is not so wholly improbable as to warrant his evidence being rejected as being impossible or highly improbable.

[128] It was also submitted that one of the persons in the crowd had committed the stabbing and slashing, not Lobo. However this issue was not specifically put to Pragash, SP2. And there is no other evidence to support the proposition that one of these unknown persons in the crowd were responsible for the injuries inflicted on Raguram and Murali.

[129] Finally it was contended that Pragash, SP2 had contradicted himself in the course of cross-examination. The context of the cross-examination was as follows:

Q: Saya cadangkan kamu tidak juga melihat Lobo memotong Murali kerana kawasan itu juga gelap?

A: Tidak setuju.

Q: Kalau Murali ada dipotong pada masa menarik keluar Raguram, awak tak dapat nampak kerana tengok ke arah lain?

A: Setuju.

Q: Dan di dalam keadaan begitu, ramai orang di situ, kemungkinan orang yang memotong juga tidak dapat dinampak oleh kamu?

A: Setuju.

[130] By reason of the answers to the last two questions, it was contended that Pragash, SP2 had not seen Lobo slashing Murali's neck from behind. In order to decide whether the witness's evidence on this issue ought to be disregarded on this issue, the court undertook an assessment of SP2's evidence as a whole in relation to the witness's evidence that he had seen Lobo slash Murali's neck.

[131] In examination-in-chief:

A: Semasa saya keluar dari khemah tersebut saya nampak ada pergaduhan berlaku di hadapan khemah. Saya nampak Raguram dipukul oleh beberapa orang. Abang saya bernama Murali tarik Raguram dari dipukul oleh orang-orang tersebut. Selepas itu orang bernama Lobo telah potong di leher Murali daripada belakang Murali. Lobo menggunakan sebilah pisau kecil. Semasa Murali mendekati khemah dia sedang memegang lehernya. Terdapat darah mengalir dari leher Murali...

Q: Semasa Lobo memotong leher Murali, dia pegang pisau di tangan mana?

A: Saya nampak pisau yang dipegang oleh Lobo di tangan kanan.

Q: Pisau itu berapa panjang?

A: Lebih kurang 22cm atau 9 inci.

Q: Pisau jenis apa?

A: Saya tidak tahu.

Q: Pisau bernama?

A: Tidak tahu.

Q: Semasa dia memotong leher Murali dari belakang adakah Lobo memegang Murali?

A: Tidak.

Q: Boleh tunjuk bagaimana cara dia memotong leher Murali?

A: (Mr Ayasamy offers himself as a 'victim' for witness to show how Murali's neck was cut. Witness shows how he saw Murali's neck being slashed from the back).

Q: Semasa Lobo memotong leher Murali di mana Raguram?

A: Murali di hadapan Raguram. Murali memegang tangan Raguram.

Q: Adakah kamu kenal Lobo?

A: Saya nampak dia tetapi saya belum kenal dia...

Q: Daripada gambar ini, boleh tunjuk tempat di mana Lobo memotong leher Murali? (P5).

A: Saksi menandakan gambar A dengan'X'.

Q: Dan di mana pula kedudukan kamu? (Pohon tanda 'Y').

A: Saksi menandakan tempat di ada, dalam khemah sebagai 'Y'...

Q: Kamu kata kamu nampak Raguram di pukul di antara 12 hingga 1 pagi. Pukul berapa awak tengok Lobo potong leher Murali? (Witness is upset and keeps his head down).

A: Jam lebih kurang 12.15 pagi hingga 12.20 pagi...

And in the course of cross-examination by counsel for the second accused, Lobo:

Q: Dan apabila Murali menarik Raguram adakah dia masuk dan menariknya?

A: Dia masuk ke dalam kumpulan orang dan tarik Raguram.

Q: Saya cadangkan semasa Murali pergi untuk menarik Raguram di ambil satu parang berukuran tiga kaki.

A: Saya tidak nampak Murali bawa pisau...

[132] Followed by the three questions set out above in cross-examination and which is relied upon to state that the entirety of Pragash, SP2's evidence relating to Murali's neck being slashed by Lobo should be ignored. Further on in cross-examination, Pragash, SP2 also testified:

Q: Dan kamu kata Murali telah dipotong pada masa pegang tangan Raguram dan tariknya keluar. Selepas Murali jatuh ke tanah, apa terjadi ke Raguram?

A: Selepas kena potong, Murali melepaskan tangan Raguram. Murali mengambil langkah dan terus jatuh ke tanah. Saya tidak tahu apa berlaku kepada Raguram.

And in re-examination on this issue:

Q: Dalam pemeriksaan balas, awak kata tempat 'X' di dalam gambar gelap. Bagaimana kamu tengok dengan jelas Lobo memotong leher Murali?

A: Tempat itu sebenarnya bukan sangat gelap dan saya nampak Lobo memotong leher Murali...

[133] When viewed in totality, Pragash, SP2's evidence relating to Murali's neck being slashed does not appear to have been seriously compromised by the two selected questions in cross-examination. It would be difficult for Pragash, SP2 to have given details such as demonstrating the manner in which Lobo slashed Murali's neck from the back, or the sequence of events whereby Murali held Raguram's hand, then let it go, staggered a few steps and then collapsed. As a consequence no serious doubt was raised as to the veracity of Pragash, SP2's evidence. Moreover, SP2's evidence was corroborated in several aspects by the evidence of Satisgopal, SP3, Satis, SP4 and Thambi, SP5.

[134] There were no fundamental contradictions in the testimony of these witnesses relating to Murali. However it is noteworthy that Pragash, SP2 was the witness who saw Lobo slashing Murali's neck. Satis, SP4 saw Murali holding his neck after it had been slashed, and similarly saw him collapse after he took a few steps. He did not state that he saw Lobo slashing Murali's neck. Thambi, SP5 in turn, gave evidence that he saw Lobo place a knife at Murali's neck and say 'you don't interfere' in Tamil. Then he says he cannot really recollect but he recalls Murali holding his neck. There are therefore no contradictions between the versions of events relating to Murali given by these eyewitnesses. If at all, their evidence is remarkably consistent. However for the purposes of an eyewitness account of the identity of the person who slashed Murali in the neck, the testimony of Pragash, SP2 and Thambi, SP5 is primarily relevant.

Were there material contradictions in the evidence of the witnesses as to the direction from which Murali was slashed in the neck?

[135] It was also contended that there were contradictions as to the direction from which Murali's neck was slashed. In this context it was pointed out that Pragash, SP2 gave evidence that Murali's neck was slashed from behind. This witness also demonstrated how Murali's neck was slashed. However he was not asked and he did not specify on which side of his neck Murali was slashed.

[136] Satisgopal, SP3 however stated that Murali's neck was slashed 'frontal to the side' (right) when the post-mortem report showed that the slash wound was on the left side of his neck. This indeed is a discrepancy. However this witness's evidence was consistent with that of Pragash, SP2 when he said that Murali's assailant attacked him from behind. This 'discrepancy' in Satisgopal's evidence in the context of the entirety of Satisgopal, SP3's evidence when compared with Pragash's evidence did not amount to a major contradiction.

Where was Murali when his neck was slashed?

[137] The contention here was that the evidence of the various witnesses as to Murali's position/location when his neck was slashed was materially different. Pragash, SP2 had marked the location as 'x' on the photograph P5 while Satisgopal had said the place could not be seen. Satis, SP4 marked the location as 'U'. First it is to be reiterated that the entire area where the incidents of the night occurred was a relatively small area as explained above. Secondly there was only one photograph, P5 that was relevant for the purposes of attempting to mark the location of the players, and even this photograph did not focus on the road between the front of the Mariamman temple and the temple, but was taken from a different angle. Any form of marking on the photograph could at best be approximate. Notwithstanding this, Pragash, SP2 and Satis, SP4 were consistent when they marked 'x' and 'u' on P5 as being the location where Murali's neck was slashed when he went to rescue Raguram. 'X' and 'U' are virtually at the same place. Satisgopal was the only witness who could not point out where this event had taken place.

[138] SP4 went on to mark both 'I' and 'U' on exh P6, the sketch plan as denoting the place where Murali held his neck after it had been slashed. He made the marking 'U' during examination in chief and 'I' during the course of cross-examination. This it was held was a major contradiction. However when viewed on exh P6 it is apparent that there is very little distance, a matter of a few feet or yards between 'I' and 'U'. Again this does not appear to amount to a major contradiction. What remains clear however is that the events of that night occurred almost squarely in front of the entrance to the Mariamman temple. Given the small area within which these occurrences took place, the evidence of the witnesses cannot be said to be contradictory.

Where were the eyewitnesses when Murali's neck was slashed?

[139] The suggestion here was that it was not possible for Pragash, SP2 to have sighted Lobo slashing Murali's neck when Satisgopal, SP3, who was closer to the crowd did not see the identity of the man who slashed Murali's neck. This argument is conjecture and not based on evidence. Ultimately the measure of Pragash, SP2's and Satisgopal's credibility must depend on their testimony. This is not a case where the possibility of Pragash, SP2 sighting Lobo is so clearly improbable or impossible that the only conclusion the court can come to, is to disregard his evidence on this aspect. The evidence of these two witnesses however is entirely coherent in that Satisgopal, SP3's view of Murali's assailant was clearly blocked as he explained in the course of his evidence. Pragash, SP2's evidence was not so blocked, thereby enabling him to identify Lobo. As there is no reasonable evidence or basis to infer or surmise that Pragash is concocting his evidence, it remains valid and relevant.

Where did the witnesses go after the incident?

The submission of counsel for the second accused, Lobo was that the eyewitness's versions of events immediately after the killings differed substantially. A reading of the evidence of Pragash, SP2, Satisgopal, SP3 and Satis, SP4 will show that there was a skirmish or fight soon after the incidents whereby the witnesses had a fight or were beaten by persons wearing helmets or using helmets. The precise sequence of events may well not be recollected in full by these individual witnesses particularly in the aftermath of their witnessing three men being killed within a short space of time. What is evident is that there was a skirmish of sorts just before the injured men were placed in ambulances to the hospital. This in itself does not suggest that the witnesses were lying outright about the what they saw vis-a-vis Raguram, Murali and Boy.

Lighting at the place of the incident

[140] The evidence of the eyewitnesses as a whole reveal that there was sufficient lighting that night to enable them to view the occurrences of violence. There was light from at least one street lamp, light from the temple which was described as being bright and sufficient to light the area immediately outside it, as well as coloured lights from the tent area.

[141] None of the witnesses stated that they had difficulty identifying the assailants by reason of the failing light or lack of light. On the contrary, the witnesses either maintained that they could see the victims and their assailants clearly notwithstanding that it was night time by reason of the various lights referred to.

[142] Counsel cited the following evidence of Pragash, SP2 in support of his contention:

Q: Saya cadangkan kamu tidak dapat lihat muka mereka kerana tempat itu gelap, oleh sebab itu awak tidak dapat mengecam.

A: Setuju

However this response has to be viewed in the context of the previous question:

Q: Adakah kamu boleh mengecam 15–20 orang yang mengurungi Raguram?

A: Saya tidak pernah tengok muka mereka sebelum ini.

[143] It was in this context that the earlier question was posed. Therefore Pragash, SP2 was testifying that he could not identify the 15–20 persons around Raguram primarily because he had never seen them before. Additionally he also agreed that he could not identify these unknown persons because it was dark. But further on in cross-examination when this issue was specifically put to Pragash, SP2 he disagreed that it was dark:

Q: Setuju dengan saya kalau saya katakan bahawa rujuk P5A dan P6, di M dan T. Setuju bahawa kawasan ini ada gelap?

A: Tidak setuju.

And in re-examination:

Q: Dalam pemeriksaan balas, awak kata tempat 'X' di dalam gambar gelap. Bagaimana kamu tengok dengan jelas Lobo memotong leher Murali?

A: Tempat itu sebenarnya bukan sangat gelap dan saya nampak Lobo memotong leher Murali.

[144] As for Satis, SP4 he was clear that there was sufficient light from the Mariamman temple, the JKR flats close by and the lights strung across the top of the tent to illuminate the place of the incident sufficiently. SP5 too maintained that the lights from the Mariamman temple were sufficient to illumine the area outside the temple. The violence culminating in the death of the three men also, as testified by the witnesses, took place opposite the front of the Mariamman temple. This is evident from a perusal of the markings in exhs P5 and P6 which are dotted around a small area in front of the temple. The markings which denote the positions of the victims as well as the witnesses all show that the witnesses, the victims and their assailants were all located within a small area, comprising only several square feet. As such the lighting from the street lamp, the Mariamman temple, the JKR flats nearby and the tent as testified by the witnesses provided sufficient lighting for identification by the witnesses.

[145] Notwithstanding the evidence of the witnesses taken as a whole, it was contended on behalf of the second accused, that in view of the poor lighting and the crowd, coupled with the panic that arose after the initial fight, it was not possible for these witnesses to have sighted what they testified to. In short, that the witnesses were lying. In order for the court to reject the sworn evidence of these witnesses in toto, it should have been apparent in the course of their evidence, or cross-examination that they were lying. While there were instances in the course of cross-examination when they were less certain of their answers, and discrepancies did arise between the evidence of each of the witnesses as to precisely what each one of them saw, these

omissions and discrepancies were not so fundamental or extreme as to warrant a rejection outright of their evidence. Care was taken in the assessment of the evidence of these witnesses, in view of the contention by the defence that they had conspired to make up the evidence in relation to the identity of the assailants of the three victims. However, the details which these witnesses were able to recollect, and the manner in which they recounted their memories of the incident, as a whole impressed the court that they were not fabricating evidence as a consequence of a conspiracy. Their responses to the questions put to them in cross-examination were given unhesitatingly, and where they were unaware of a particular fact, they said so. The fact that they knew the assailants prior to the incidents on that night made their recognition of them all the easier and more certain. There was no evidence before the court at this stage that there was long-drawn enmity between the eyewitnesses and the assailants, or the victims and the assailants. The purpose of the attack remains unclear. Given the foregoing, the rejection of their evidence would be untenable. It therefore follows that in order for them to have given their eyewitness accounts in the manner they did, they saw the incidents as they described them. Again it should be borne in mind that unlike a case of identifying unknown assailants, in this case, the eyewitnesses were identifying witnesses known to them.

The evidence of the toxicologist

[146] The evidence of the toxicologist has been detailed above. The significant part of her testimony relates to the fact that she concluded that the deceased were intoxicated at the time of death. She so concluded from an analysis of blood samples from the deceased. It should be borne in mind that these samples were stored at temperatures below four degrees centigrade. As such her conclusion has to be considered in the light of her acceptance that decomposition of the blood samples occurs when blood samples are stored below four degrees centigrade. In this case, by reason of the inefficiency of the investigation process, the blood samples were so stored for a lengthy period before being handed over for analysis. This would undoubtedly have affected the results of the analysis. The extent to which the deceased were intoxicated, if at all, therefore remains unclear. More significantly however, even if they were intoxicated, this does not in any way affect the fact that they were fatally attacked that night. None of the three accused were armed, and there is no evidence to suggest that they initiated or provoked a fight.

[147] It remains to be considered whether the fact that the toxicologist concluded that the deceased were intoxicated goes to show that all the other witnesses that night were lying about the consumption of alcohol. All the eyewitnesses as well as those who gave evidence prior to and after the event, were clear that no alcohol was served at the wedding dinner prior to the

incidents. As there was a religious festival going on, the serving or consumption of alcohol near or at the temple would have been prohibited. Again there was no evidence of alcohol being served or consumed by the deceased at the temple site. The evidence of SP2, SP3, SP4, SP5, SP6 and SP8 all bore this out. Accordingly it is unlikely that the witnesses were lying about the consumption of alcohol.

The fourth ingredient of the charges against the second accused, Lobo: Did he cause the injuries to Raguram and Murali with the intention of causing death or with the intention of causing bodily injuries and were the bodily injuries intended to be inflicted sufficient in the ordinary course of nature to cause death?

[148] This last ingredient has to be considered separately in respect of each Raguram and Murali. Moreover this crucial part of the charge comprises two separate components, namely:

(a) whether Lobo in inflicting the injury on Raguram intended to cause death or intended to cause that particular bodily injury; and

(b) was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death?

[149] The same two queries would have to be considered vis-a-vis Murali. The application of s 300 of the Penal Code and the interpretation to be accorded to it was discussed in the case of *Mohamed Yasin bin Hussin v Public Prosecutor* [1976] 1 MLJ 156 where the Privy Council explained the full extent of the section. In that case the trial court had found the appellant guilty of murder where in the course of a burglary and rape, the appellant had grabbed the deceased, thrown her to the ground, forcibly sat on her and raped her. The deceased suffered serious injuries which resulted in death. The trial court concluded that the fatal injury was caused by the accused intentionally and not accidentally or unintentionally, and therefore fell within the purview of s 300(c). The Privy Council ruled otherwise. However the Privy Council in rejecting this conclusion stated as follows:

> ... this fails to give effect to the distinction drawn in ss 299 and 300 of the Penal Code, in cases where the accused did not deliberately intend to kill, between the act by which death is caused and the bodily injury resulting from that act. In the instant case, the act of the appellant which caused the death, viz, sitting forcibly on the victim's chest, was voluntary on his part. He knew what he was doing; he meant to do it; it was not accidental or unintentional. This, however, is only the first step towards proving an offence under s 300(c) of the Penal Code. Not only must the act of the accused which caused the death be voluntary in this sense; the prosecution must also prove that the accused intended, by doing it, to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death.

... The lacuna in the prosecution's case which the trial judges overlooked was the need to show that, when the accused sat forcibly on the victim's chest in order to subdue her struggles, he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being of the victim's apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal.

There was no finding of fact by the trial judges that this was the appellant's intention; nor, in Their Lordships' view, was there any evidence upon which an inference that such was his intention could have been based. There was no admission by the accused that he had sat on the victim's chest at all. The judges' finding that he did so was based upon the evidence of the pathologist which they were entitled to accept that this was the most probable way in which the internal injuries to the victim's ribs had been caused. *But to fall on someone's chest, even forcibly is something which occurs frequently in many ordinary sports, such as rugby football, and though it may cause temporary pain, it is most unusual for it to result in internal injuries at all let alone fatal injuries.*

To establish that an offence had been committed under s 300(c) or s 299, it would not have been necessary for the trial judges in the instant case to enter into an enquiry whether the appellant intended to cause the precise injuries which in fact resulted or had sufficient knowledge of anatomy to know that the internal injury which might result from his act would take the form of fracture of the ribs, followed by cardiac arrest. As was said by the Supreme Court of India when dealing with the identical provisions of the Indian Penal Code in *Virsa Singh v State of Punjab* AIR 1958 SC 465 at p 467:

> ... that is not the kind of enquiry. It is broad-based and simple and based on commonsense.

[150] Therefore the fact that the appellant in the case had forcibly sat on the deceased did not comprise an injury that in the ordinary course of nature, could give rise to death. And this question had not been considered by the trial court.

[151] In *Virsa Singh v State of Punjab* AIR 1958 SC 465 (*Virsa Singh*'s case) the Supreme Court of India laid down the following facts which the prosecution need to prove before it can bring a case under s 300(c) of the Penal Code:

(i) it must establish that a bodily injury is present;

(ii) the nature of the injury must be proved;

(iii) it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and

(iv) it must be proved that the injury of the type described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature.

[152] In the instant case, vis-a-vis Raguram, both (i) and (ii) have been established. How then is limb (iii) ascertained? In *Virsa Singh*'s case, V Bose J stated as follows:

> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot and whether with sufficient force to cause the kind of injury found to have been inflicted. It is of course, not necessary to enquire into every last detail, as for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course that is not the kind of enquiry. It is broad-based and simple based on commonsense; the kind of enquiry that 'twelve good men and true' could readily appreciate and understand.
>
> *Did Lobo therefore intend to inflict upon Raguram the kind of injury that he suffered? Can it be concluded that it was not accidental or unintentional?*

[153] Applying the foregoing principles to the facts of the instant case, it is evident from the evidence that:

(1) Lobo was armed or had in his possession a knife;

(2) Lobo attacked Raguram and assaulted him repeatedly on several areas of his body, including his arms, face, neck, shoulder and culminating in a stab injury over the left chest, described in the post-mortem report, exh P-20 as a stab injury over the left chest 1cm from the midline, elliptical in shape, almost vertical position directed inwards and laterally measuring 10.7cm deep. It had the effect of cutting through the chest cavity at the level of the fifth rib then penetrated the heart through and through;

(3) Lobo used a sharp knife to inflict the fatal injury to the heart;

(4) The wound to his chest was so serious that he died a few minutes after being stabbed in the chest and was dead by the time he arrived in the hospital;

(5) The pathologist also noted that Raguram had other defensive wounds over the right hand, clearly in an effort to ward off the injuries being rained upon him; and

(6) Raguram was unarmed.

[154] From the foregoing facts and the depth to which the knife penetrated, the fact that Lobo chose a vulnerable part of Raguram's body, namely his chest, near the heart and the force with which he inflicted the wound as testified to by the many eyewitnesses can only give rise to the conclusion that Lobo intended to, and did inflict the kind of injury Raguram suffered. It cannot be termed accidental or unintentional.

Was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death?

[155] The enquiry does not end there. It must also be considered whether the injury inflicted, namely the stab wound to the chest which penetrated the heart 'through and through' was sufficient in the ordinary course of nature to cause death. In this context, the evidence of the pathologist, SP20 was clear:

A: Sebab kematian ialah luka tikam bahagian jantung. Iaitu *stab injury to the heart*. Ini boleh menyebabkan pendarahan yang banyak.

Q: Dasarkan luka hirisan dan tikaman, boleh beri pandangan apa yang sebabkan luka hiris dan tikaman?

A: Luka hirisan dan tikaman adalah disebabkan oleh satu senjata tajam contohnya pisau.

Q: Adakah luka tikaman di dada pada lazimnya boleh menyebabkan kematian?

A: Ya, lazimnya boleh menyebabkan kematian.

Q: Apakah punca kewujudan 1500ml darah dalam dada di *Left Chest Cavity*?

A: Darah ini berpunca dari kecederaan kepada jantungnya yang disebabkan oleh tikaman kepada dada di sebelah kiri.

Q: Dalam keadaan biasa jika seorang mengalami tikaman di jantung, berapa lama sebelum kematian akan disebabkan?

A: Saya anggarkan kurang dari 15 minit...

[156] The pathologist, SP20 was clear that such an injury would in the ordinary course of nature cause death. In the instant case, the wound was so deep that death ensued within about 15 minutes in his estimation. *As both limbs of s 300(c) have been made out it follows that at this stage, based on the evidence presented by the prosecution, a prima facie case has been made out against the second accused Lobo under s 302 of the Penal Code with respect to the*

murder of Raguram. Lobo is therefore required to enter his defence against this charge brought against him.

Murali

[157] Applying the same principles to the incident giving rise to the death of Murali, the relevant questions to be considered are:

(a) whether Lobo in inflicting the injury on Murali intended to cause death or intended to cause that particular bodily injury; and

(b) was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death?

[158] In this second incident, Murali intervened to assist Raguram, when Lobo slashed him on the left side of his neck from behind. This is how the pathologist described the injury in his post-mortem report, exh P19:

> *Stab wound over left angle of neck, elliptical shape, oblique position measuring 3.5 x 0.5cm. The wound was 1.5cm below left ear lobe. The wound was directed inwards and slightly downwards, cutting the left carotid artery forming a depth of 7cm.*

[159] He concluded that the cause of death was the severed left carotid artery due to the stab injury to the left side of Murali's neck. The stab injury severed the left common carotid artery causing massive blood loss. He also testified that the injury to the neck was caused by a sharp object such as a knife.

[160] Thambi, SP5 gave evidence that Lobo placed the knife at Murali's neck and shouted in Tamil: 'you don't get involved'. The stabbing took place after that. The fact that:

(a) Lobo attacked Murali because he intervened while he was hitting and stabbing Raguram repeatedly;

(b) warned him not to get involved;

(c) held a knife to Murali's neck; and

(d) then slashed Murali's neck inwards and downwards, cutting the carotid artery to a depth of no less than 7cm.

[161] All indicate that Lobo intended to inflict the injury that he did on Murali. It was neither accidental nor unintentional, particularly in view of what he said prior to slashing Murali's neck. While there was only one wound, the fact that it was inflicted at such a vital place and to the depth it did, resulting in massive bleeding and death can only show that Lobo

intended to inflict serious bodily injury on Murali.

Was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death?

[162] The pathologist, SP20 testified as follows in relation to this issue:

Q: Apakah yang menyebabkan tikaman sebelah kiri yang mengerat left carotid artery?

A: Luka tersebut boleh disebabkan oleh satu alat yang tajam seperti pisau.

Q: Jelaskan bagaimana cedera ke LCA boleh menyebabkan kematian.

A: Kecederaan kepada LCA boleh rnenyebabkan pendarahan yang banyak, dan ini boleh menyebabkan kematian.

Q: *Adakah tikaman kepada sebelah kiri yang mengerat LCA lazimnya boleh menyebabkan kematian?*

A: *Kecederaan kepada LCA boleh menyebabkan pendarahan yang banyak, dan ini boleh menyebabkan kematian.*

Q: *Adakah tikaman kepada sebelah kiri yang mengerat LCA lazimnya boleh menyebabkan kematian?*

A: *Pada lazimnya sekira darah keluar dengan banyak dari kecederaan dari LCA boleh menyebabkan kematian.*

Q: Dalam kes ini adakah kecederaan LCA ke atas mangsa terdapat darah keluar dengan banyak?

A: Ya.

Q: Adakah carotid artery satu organ penting?

A: Pembuluh carotid adalah satu organ yang agak penting yang membawa darah dari jantung ke otak.

Q: Jika carotid artery mengalami kecederaan adakah fungsi dikesan?

A: Ya.

Q: Dengan kecederaan yang dialami oleh si mati, berapa lama si mati akan mati selepas tikaman?

A: Saya anggarkan boleh menyebabkan kematian kurang dari 1/2 jam.

[163] The medical evidence is therefore clear that the severance of the carotid artery which supplies blood from the heart to the brain amounts to

an injury to a vital part of the body which has the effect, in the ordinary course of nature to result in significant blood loss and death within a short space of time.

[164] In *Mariadasan and others v State of Tamil Nadu* AIR 1980 SC 573, where the deceased sought to intervene in a sudden altercation between a man and the accused, the accused assaulted him with a knife on several parts of the body and caused a serious injury to the chest. In deciding that the act of the accused amounted to murder, the Indian Supreme Court stated as follows in relation to the injury:

> ... so far as A2 (the accused) is concerned the medical evidence of PW9 shows that one of the injuries caused by A2 was on the chest which cut a part of the thoracic aorta which was main portion of the heart and also, fractured eighth and ninth ribs on the right side of the chest. According to the doctor this injury was sufficient in the ordinary course of nature to cause death. Having regard therefore, to the nature of the injury and the vital and delicate part of the body at which it was aimed, we are unable to agree with Mr Singh that the act of A2 could in any way fall under section 304, Part I or Part II. The High Court was, therefore absolutely correct in holding that A2 was guilty of committing murder of the deceased Francis particularly in view of the brutal injury caused on the chest of the deceased.

[165] Based on the foregoing facts and circumstances, it is concluded that a prima facie case has been made out by the prosecution against the second accused Lobo in respect of the murder of Murali under s 302 of the Penal Code.

The second accused, is therefore called upon to enter his defence in respect of both charges made against him under s 302 of the Penal Code in relation to the deaths of Raguram and Murali.

THE THIRD CHARGE RELATING TO THE THIRD ACCUSED SIVAN IN RESPECT OF THE DEATH OF BOY

[166] The charge against the third accused, Sivan has been set out above. As with the charges against the second accused, Lobo, the prosecution also submitted that in this case it relies upon the third limb of s 300 of the Penal Code. It is therefore incumbent upon the prosecution to prove the following ingredients/elements in respect of each of the charges against the third accused, Sivan whereby he is charged with the murder of Boy:

(1) that Boy is dead;

(2) that Boy died as a result of injuries sustained by him;

(3) that Boy's injuries were caused or were the result of the act of the third accused, Sivan; and

(4) that in inflicting the injuries upon Boy, the third accused, Lobo either:

(a) ...;

(b) ...;

(c) caused the injuries with the intention of causing bodily injuries and the bodily injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death.

Elements (1) and (2): Boy is dead and died as a result of injuries sustained by him

Element (1): Boy is dead

[167] Venkataswara Rao, SP15 gave evidence that on 18 September 2004, his son, Boy then aged seventeen, left to visit his grandmother and never returned home. He was called at 1am on the morning of the 19 September and informed that his son was in hospital. He was only allowed to identify his son, who had passed away, two days later. SP15 identified his son, Boy from the post-mortem photographs.

[168] The pathologist, SP20 has also given evidence of Boy's death and the post-mortem conducted on him. The first ingredient is therefore satisfied.

Element (2): Boy died as a consequence of the injuries sustained by him

[169] The evidence of the pathologist, SP20 is that Boy died as a consequence of the stab injury to his chest which cut through his ribs and through the outer wall of the heart up to the interventricular wall. He said that the cause of the death was the stab injury to the heart. Accordingly the second ingredient is also fulfilled.

Were Boy's injuries were caused or the result of the act of the third accused, Sivan?

[170] This is the issue that is most fiercely disputed by the defence in this case. Counsel for the third accused maintained that this element/ingredient of the charge had not been made out against the third accused, Sivan for the following reasons:

(i) the prosecution witnesses are not credible witnesses based on their evidence that is contradictory and raises suspicions and questions regarding the charge against the third accused;

(ii) the prosecution failed to call a material witness, one Jeganathan a/l Selvaraj whose testimony if available would be adverse to the

prosecution case; accordingly s 114(g) of the Evidence Act 1950 should be invoked against the prosecution for such failure to produce relevant evidence; and

(iii) there was a failure to conduct a complete and detailed investigation in this case resulting in numerous doubts arising in respect of the case against the third accused, Sivan.

Issue (a): The prosecution witnesses are not credible witnesses based on the contradictions in their testimony

(a) Events prior to the stabbing of Boy

[171] It is contended that a contradiction arises between the evidence of Satis, SP4, Satisgopal, SP3 and Thambi, SP5 on the following basis: Satis, SP4 stated that the third accused, Sivan said to Boy immediately prior to stabbing him: 'Why do you want to hold Murali?' According to Satis, SP4 he was about three metres away.

[172] Satisgopal, SP3 who said that he was about 1.5 metres stated that he had forgotten what the third accused, Sivan said prior to stabbing Boy. And Thambi, SP5 who said he was seven metres away, said he could not remember whether Sivan said anything to Boy prior to Sivan stabbing Boy.

[173] The foregoing testimony of these witnesses does not reveal a contradiction. It shows that two of the three witnesses could not recall what Sivan said prior to stabbing Boy. In fact, Satisgopal, from his evidence remembers that something was said, but cannot recall the words. There is no inconsistency here, merely a difference in the recollection of the various witnesses which is to be expected, given that the witnesses are wholly unlikely to recall the events identically.

(b) The evidence of the eyewitnesses in relation to the actual stabbing of Boy

[174] Satisgopal, SP3 it is contended was inconsistent in his evidence because he stated in examination in chief that the third accused stabbed Boy in the chest, pointing to the centre.

Q: Adakah kamu nampak Sivan tikam Boy di mana?

A: Di bahagian dada (centre of the chest).

But in cross-examination it is contended, he said he could not recall how Boy was stabbed.

Q: Boleh ingat bagaimana Boy ditikam?

A: Saya tak ingat.

[175] It is evident that the two statements made by the witness relate to different issues; the question in examination in chief relates to where Sivan stabbed Boy; in cross-examination it was how Sivan stabbed Boy. An inconsistency does not arise because the questions relate to different matters.

[176] It was submitted that material contradictions arose in the testimony of Satis, SP4 because in examination in chief he said that the knife that was plunged in Boy's chest could not be dislodged and was twisted by the third accused, Sivan before being withdrawn. He went on to say that he could not recall which hand Sivan used to stab Boy. However in cross-examination it was contended that he contradicted himself materially in that he agreed with the proposition put to him by the defence that he did not note which hand Sivan, the third accused used to stab the third accused because he did not witness the incident at all. And this statement was not addressed in re-examination:

Q: Saya cadangkan kepada awak bahawa awak tidak nampak Sivan tikam menggunakan tangan mana kerana awak tidak nampak kejadian langsung.

A: Saya setuju.

[177] On the basis of this one answer the court is urged to reject the entirety of Satis, SP4's evidence relating to what he said he saw in relation to the stabbing of Boy. In assessing the credibility of Satis, SP4 the court is bound to undertake a meticulous examination of his evidence as a whole to arrive at a conclusion; it cannot necessarily rely on one answer in cross-examination to reject his evidence outright on this issue. This is what Satis, SP4 said in relation to the issue of his having witnessed the third accused, Sivan stabbing Boy. In examination-in-chief:

> ... Semasa Murali jatuh Boy pegang dia dari jatuh ke bawah. Kemudian Sivan mendekati Boy dan bagitahu Boy: 'Kenapa kamu nak pegang Murali?' Sivan menolak Murali dan menikam Boy di bahagian dada. Pisau yang menyusuk di dada Boy tidak dapat dikeluarkan dari dada Boy. Sivan pusingkan pisau yang ada di dada Boy dan terus keluarkan dari dada Boy. Selepas itu Lobo beritahu kepada Chinnavan atau Sivan, 'Jom kita beredar dari tempat tersebut'. Lobo dan Sivan cuba lari dari tempat tersebut...

Q: Ada kamu nampak pisau yang digunakan oleh Sivan untuk tikam Boy?

A: Ya

Q: Boleh tunjuk berapa panjang pisau itu?

A: Lebih kurang 10 inci

Q: Warna pisau itu?

A: Saya tidak ingat.

Q: Jenis pisau?

A: Saya tidak ingat.

Q: Bagaimana bentuk hujung pisau?

A: Tajam

Q: Semasa Sivan menikam dada Boy ada tengok pisau masuk ke dalam dada?

A: Ya saya tengok

Q: Semasa pisau menusuk, separuh atau seluruh?

A: Masuk separuh

Q: Berapa jarak di antara kamu dan tempat Sivan menikam dada Boy?

A: Ke kerusi depan di Mahkamah – tiga meter

Q: Kamu kata Maran (Satisgopal, SP3) suruh awak menarik baju Boy. Adakah kamu tarik?

A: Ya, saya tarik. Saya nampak luka di dada Boy. Terdapat darah di luka tersebut darah yang sikit

...

Q: Berapa lama pula selepas Murali memegang lehernya, Boy di tikam oleh Sivan?

A: Dalam lebih kurang tiga minit.

Q: Bagaimana cara Sivan menikam Boy, kuat atau perlahan?

A: Dengan perlahan. Tidak begitu laju.

Q: Sivan menikam Boy dengan pisau di tangan mana?

A: Saya tidak ingat...

...

Q: Macam mana Sivan menolak Murali?

A: Mula-mula Sivan tolak Murali dengan tolak bahu Murali ke tepi dan selepas itu baru menikam Boy di bahagian dada.

And in cross-examination:

Q: Boleh ingat pakaian Boy, Raguram dan Murali?

A: Boy memakai T-shirt warna merah. Saya tidak ingat pakaian Murali dan Raguram.

...

Q: Saya cadangkan kepada awak oleh kerana P5 tidak menunjukkan terdapat kesan darah, kejadian tidak berlaku di tempat yang kamu katakan.

A: Kesan darah ada di hadapan kuil Mariamman. Kalau gambar di ambil di depan kuil boleh nampak kesan darah.

Q: Saya juga cadangkan awak sendiri tidak tahu di mana tempat kejadian.

A: Tidak setuju.

...

Q: Saya cadangkan pada masa kejadian berlaku perhatian awak ditumpukan terhadap pisau dan bukan orang yang memegangnya.

A: Tidak setuju.

...

Q: Pukul berapa Lobo menikam Raguram?

A: Saya tidak tahu

Q: Pukul berapa Sivan menikam Boy?

A: Tidak tahu

Q: Pukul berapa Murali memegang Lobo yang dipotong?

A: Tidak tahu

Q: Saya cadangkan awak bohong kerana sebelum ini awak telah memberitahu mahkamah ia terjadi di antara 11.55pm dan 12.20am.

A: Peguam tanya pukul berapa Lobo menikam Raguram. Saya tidak tahu tepat pukul berapa. Tetapi kejadian berlaku di antara 11.55pm dan 12.20 pagi.

Q: Jadi awak setuju kejadian Lobo menikam Raguram di antara 11.55 hingga 12.20am?

A: Setuju.

Q: Siapakah yang ditikam dahulu?

A: Raguram yang ditikam dulu.

Q: Bila Boy ditikam, selepas Raguram atau Murali?

A: Selepas Murali dipotong di leher baru Boy dapat tikaman di dada.

...

Q: Semasa kejadian adakah Murali berbadan lebih besar daripada Boy?

A: Ya.

Q: Rujuk P7. Boleh tunjukkan kepada mahkamah bagaimana Boy memegang Murali selepas Murali dipotong.

A: Saksi menunjukkan bagaimana Murali (Mr Ayasamy) leans his back against Boy (Satis, SP4). Murali dipegang oleh Boy dari belakang.

Q: Di mana awak berada pada masa itu. Di belakang Boy?

A: Saya bukan di belakang Boy. Saya di sisi kanan mereka.

...

And in re-examination:

Q: Dalam pemeriksaan utama, awak kata Sivan tikam Boy. Tetapi dalam pemeriksaan balas awak kata awak tidak menengok pisau yang di gunakan untuk tikam Boy kerana keadaan kelam kabut. Jelaskan.

A: Saya nampak pisau yang digunakan tetapi saya tidak tahu jenis pisau yang digunakan oleh Sivan.

[178] A perusal of the entire testimony of Satis, SP4, therefore reveals that his testimony as a whole is coherent and consistent. The one response in cross-examination is not sufficient to shake his credibility in respect of the entirety of his evidence relating to the stabbing of Boy. The detail recalled, coupled with corroboration from Satisgopal, SP3 and Thambi, SP5 in relation to this incident further lends credence to his testimony.

[179] It was next contended that Thambi, SP5 had given evidence that Boy was stabbed in the centre of the chest when it was to the left, according to the post-mortem report, P18. A perusal of the document shows that the wound was indeed centre and towards the left. It was not on the left side of Boy's chest. There is no contradiction here.

[180] It was contended that if indeed the knife plunged into Boy's chest was not immediately withdrawn outright, but was twisted prior to withdrawals testified by the witnesses, then a 'fishtail appearance' would have shown itself on the wound, which was not the case. However, this contention disregards the evidence of the pathologist, SP20 who also said that it was

possible that if the twisting was slight, given that the heart is an organ that can move within the chest cavity as it is suspended, there would not necessarily be a fishtail appearance.

[181] Therefore it would be erroneous to conclude that the witnesses, Satis, SP4 and Thambi, SP5 who were both consistent in maintaining that the knife was not withdrawn directly out of Boy's chest but twisted slightly, were lying.

(c) Events after the stabbing

What happened after Boy had been stabbed?

[182] It was contended that there were serial contradictions in the evidence of the witnesses after the three killings. First it was submitted that Satisgopal, SP3 gave evidence that he was threatened by the third accused, Sivan together with his other friends, Vivek, SP12, Pragash, SP2 and Thambi, SP5 when in fact none of these other witnesses gave evidence to this effect. As stated earlier the fact that the other witnesses did not give identical testimony can be attributed to differing recollections. However, Satis, SP4 did give evidence that he and his friends were threatened by Sivan. The other witnesses did not recollect what Sivan said immediately before and after he stabbed Boy. In any event, it cannot be expected that each of the witnesses would recall the precise chronology of events after the killings in an identical manner when mayhem was ruling, and they were intent on getting aid to the injured. Moreover this issue cannot detract from the clear evidence of Satisgopal, SP3, Satis, SP4 and Thambi, SP5 in relation to the stabbing of Boy by Sivan.

The weapon used to stab Boy

[183] Counsel for the third accused, Sivan also tried to throw doubt on the weapon used by Sivan suggesting that it was not clear if indeed a knife was used because the witnesses could not recall the type and precise length of the knife. This submission flies in the face of the evidence of all the eyewitnesses who gave clear evidence not only as to the fact that a knife was used, but that it was lodged in Boy's chest before being pulled out. It would follow that the eyewitnesses clearly saw the knife. This issue is further corroborated by the evidence of the pathologist, SP20 who said that the injury to Boy's chest resulted from something thin and sharp.

[184] It was also sought to suggest that it was not clear precisely when Boy was stabbed, as the evidence of the eyewitnesses suggested that relatives came up to assist Murali when he was injured and only then was Boy stabbed. This submission too flies in the face of the clear evidence of Satisgopal, SP3, Satis, SP4 and Thambi, SP5 that Boy was stabbed by the third accused, Sivan

immediately after he came to Murali's rescue and tried to hold him from the back, as he was collapsing. This stance of Boy assisting Murali was demonstrated by Satis, SP4 and Thambi, SP5. Then Sivan pushed Murali aside and stabbed Boy, who collapsed. As stated earlier, the players were all in constant motion and the manner in which each witness described the stabbing of Boy was essentially similar and consistent. None of the witnesses was shaken on this issue.

Where was Boy when he was stabbed?

[185] As to the issue of the precise location where Boy was stabbed, it is reiterated as stated earlier that this stabbing took place in the vicinity of the front of the Mariamman temple as confirmed by all the witnesses. The exact location of the stabbing cannot be determined with any degree of certainty; the witnesses at best can only be expected to testify to the approximate location within which the stabbing likely to have occurred. Satis, SP4 gave clear evidence that Sivan stabbed Boy in the region marked 'b' in exh P6. He did not also state, as appears to be suggested by counsel for the third accused that the stabbing also took place at a point marked 'S-2' on P6. A perusal of the evidence discloses that Satis, SP4 stated that he was at the position marked 'S2' when Boy was stabbed at 'b' by Sivan. There is no inconsistency here.

Satis, SP4's evidence is to be regarded because he is a child of tender' years

[186] It was also sought to suggest that Satis, SP4 who was sixteen at the time when he gave his evidence, and thirteen at the time of the incident was a child and therefore his evidence should be discounted considerably as he was apt to imagine, and did not fully understand the implications of taking the oath. This issue was not raised during the course of Satis, SP4 giving his evidence. The court found, on the contrary, that at the time of giving evidence, Satis, SP4 was a mature sixteen year old who was working as a security guard. He was intelligent and one of the few witnesses who was able to comprehend the sketch plan P6 competently. His ability to recollect detail and his overall consistency during the course of his evidence impressed the court that this was a sound witness who was not 'concocting' his evidence based on tutoring from other witnesses. His account of the three incidents, was in fact, more detailed than that of the other witnesses. His responses during cross-examination were quick and exhaustive. If indeed he had been 'coached' as suggested by the defence, his testimony ought to have crumbled in material particulars during cross-examination. This was not the case. Additionally, the court was satisfied that in view of his age, namely sixteen, he comprehended fully the gravity of taking the oath and answering truthfully. In fact, counsel for the third accused put this issue to him squarely

in the course of cross-examination and he confirmed that he fully understood the implications of giving evidence. To reject his evidence on this basis would therefore be untenable.

Boy and the third accused, Sivan were friends

[187] It was next contended that Boy and the third accused, Sivan were close friends and neighbours and therefore Sivan could not have stabbed Boy as testified by the witnesses. It was submitted that Sivan was merely a 'scapegoat' particularly as he was only arrested almost a month after the incident. The fact that Boy was a friend and neighbour of Sivan's, has to be weighed against the clear testimony of several eyewitnesses that they saw Sivan stabbing Boy. It is not acceptable/rational for the court to reject the evidence of these witnesses on the basis that because Boy and Sivan were friends, it was unthinkable for Sivan to stab him. At this prima facie stage, there is insufficient basis for such a conclusion.

Blood and DNA profiling

[188] It was further submitted that because Murali's blood was not found on Boy, despite the fact that Boy held him after his neck had been slashed, this gave rise to grave suspicion with regard to the sanctity of the testimony of the witnesses. A DNA profile carried out in respect of the blood on Boy's shirt did not show any blood from Murali. Again the fact that Murali's blood was not found on Boy's shirt is to be weighed against the eyewitness accounts of the four witnesses. And it is apparent from those accounts that as soon as Murali's neck was slashed he placed his hand on his neck to staunch the flow of blood. He took a few steps prior to collapsing, when Boy rushed up to hold him for an extremely brief period of time, at which point Sivan attacked Boy, who also collapsed to the ground. It is therefore entirely possible that Murali's blood did not spill onto Boy's shirt. DNA profiling carried out on one of the blood stains found outside the Mariamman temple was found to be Murali's blood, according to the investigating officer, SP21.

Where did the three accused go after the attacks on Raguram, Murali and Boy?

[189] Further contradictions and suspicions arose, it was contended, as to where the three accused went after the attacks. Satisgopal, SP3 stated that he did not know where Lobo went after stabbing Raguram; Satis, SP4 gave evidence that Lobo and Sivan tried to run away from the area while he and his friends gave chase. He also said that Sivan tried to hit Satisgopal with his helmet. Thambi, SP5 said that he saw the three accused run in the direction of the flats behind the tent. In cross-examination he said they walked to the flats and that he did not try to stop them from getting away. Mothi, SP6 said

he did not see the three accused run towards the JKR quarters. He was however, himself hiding. A perusal of the evidence of the various witnesses shows that there are no 'contradictions' in their testimony but different witnesses witnessing different aspects of matters at various points in time. This cannot be expected to be identical as explained earlier.

[190] It was also contended that there were similar contradictions in respect of who helped to place Boy in the ambulance. However a perusal of the evidence will show that the witnesses gave evidence that Pragash, SP2, Satisgopal, SP3, Satis, SP4 and Thambi, SP5 as well as other persons who were in the vicinity assisted in placing Boy in the ambulance. It is equally clear that the eyewitnesses tried to assist to get help for each of the victims, and other persons rallied around. The fact that they do not retain an exact recollection of precisely which persons placed the various victims in vehicles for transportation to the hospital is not material. The fact that they all took part in doing so is material.

The issue of time and arrival at the Mariamman temple on the night of the incidents

[191] Counsel for the third accused also submitted that the eyewitnesses were not telling the truth because there were contradictions as to whom they went with and how they arrived at the temple on the night of 18 September 2004. Again the court concluded from a reading of their evidence as a whole that such minor differences as arose were not material contradictions that had the effect of vitiating their testimony. There is no dispute that they were in fact at the temple at the material time. In any event, Pragash, SP2 did not state whom he went with. Satisgopal, SP3 said that he went to the temple with his friends, SP2, Thambi, SP5, Satis, SP4 and Vivek, SP12. But in cross-examination he clarified that he traveled to the temple by motorbike with only his cousin, Thambi, SP5. Thambi, SP5 corroborated this in his testimony. Satis, SP4 gave evidence that he traveled by motorbike to the temple alone. There is therefore no great contradiction as suggested in their evidence. As for the time at which they were in the temple, as stated earlier on in this judgment, there was no evidence that any of them wore a watch, and they very much estimated the times at which they were at the Mariamman temple. Again however, this issue is not material because there is no dispute that they were all present that night at the material time when the incidents took place.

[192] It was also contended that because each of the witnesses gave differing accounts as to the time at which Murali arrived at the Mariamman temple, they were clearly not telling the truth. Again it is not in dispute that all the eyewitnesses saw Murali earlier on at the wedding dinner and then

subsequently at various intervals at the Mariamman temple before his death. Again alleged 'discrepancies' or differences as to the precise time at which they sighted him were bound to arise as the eyewitnesses themselves estimated the time of the various events and could not be expected to cite identical times with the mechanical rigidity of clocks.

Were the victims intoxicated?

[193] The evidence of the toxicologist, SP19 indicated that the victims were probably intoxicated at the time of their deaths. The eyewitnesses all however were unequivocal in maintaining that they did not see the three victims drinking and they did not think the three victims were drunk at the material time. Unless the three victims were behaving in a clearly intoxicated manner, the eyewitnesses would have no personal knowledge of the state of intoxication of the victims. They were however clear that no alcohol had been served at the wedding dinner and that no alcohol was served in the tent opposite the Mariamman temple. Baalasantar, SP8 in whose honour the wedding dinner was held, and who was not an eyewitness, corroborated the evidence of the eyewitnesses that no alcohol was served at the wedding dinner. There was no evidence of any alcohol being drunk or served at or near the temple. All the eyewitnesses gave evidence of the type of food that was being distributed to the devotees, namely rice.

[194] As such the eyewitnesses cannot be faulted for giving evidence of what they saw and knew in relation to the issue of alcohol. It is not clear where and how the three victims became intoxicated. There was also some doubt as to whether some degree of intoxication would arise from the fact that the requisite tests were undertaken after some delay which in itself would cause further decay and decomposition giving rise to a positive reaction to alcohol testing.

[195] Finally the fact that the victims were intoxicated does not have material bearing at this stage, on the fact that they were brutally killed that night.

What happened to Murali after his neck had been slashed?

[196] It was submitted that it was unclear who bound Murali's neck after it had been slashed. Satisgopal, SP3 maintained that it was a single man, called Maniam who had done so; Sivam a/l Muniandy ('Sivam'), SP7 gave evidence that he was the one who had wrapped a shirt round Murali's neck. Sivam, SP7 said that Murali's brother, Mothi, SP6 had been present to assist him. Mothi, SP6 only said that Sivam, Vivek and he had taken Murali to the hospital, but was not asked and did not testify as to what had happened prior

to Murali being placed in the vehicle. Satis, SP4 gave evidence that after the three accused had left the scene, and he was standing near Murali, whose neck had been slashed and was bleeding profusely. Murali asked for Satis, SP4's shirt and he took off his shirt, but this was insufficient to staunch the blood. Then Mothi, SP6 asked for Vivek's shirt.

[197] There is therefore a difference between what Satis, SP4 said and what Sivam, SP7 testified in relation to the assistance given to Murali after the stabbing. However, Sivam SP7 did say that after using his shirt, he went off to look for transport and did not know what happened to Murali in the interim. It is therefore entirely possible that Satis, SP4 went over to assist Murali too. Again this denotes the recollection of two witnesses at two different times. However, even if the two versions are not identical, it does not follow that there has been a material contradiction. Finally even if Satis, SP4's evidence on this aspect of his evidence is considered to be less than credible, it does not have the effect of vitiating the entirety of his testimony.

[198] It was also contended that Satisgopal, SP3's evidence was tainted because he was the only witness who claimed that he had accompanied Murali in the car to the hospital in a car driven by Vivek with Pragash, SP2 and Satis, SP4. All the other witnesses, namely, Satis, SP4, Pragash, SP2, Mothi, SP6, Sivam, SP7 and Vivek, SP12 gave evidence that Murali was driven to the hospital in Vivek's car, a Proton Saga with Sivam, SP7 and Mothi, SP6. As such it is evident that Satisgopal, SP3 was inaccurate in his evidence when he maintained that he had been in the car that took Murali to the hospital. Does this therefore have the effect of vitiating Satisgopal, SP3's evidence as to all else that he said? No, because again this is not a material issue, but one where the witness was clearly mistaken. His error on one aspect of his evidence did not have the effect of shaking his credibility in respect of all else that he said, although his evidence, must be scrutinised with care.

[199] As specified in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15:

> ... In this case different witnesses have testified to different parts of what had happened or what had been said and also there are, in the evidence of the witnesses for the prosecution, some discrepancies, as would be expected of witnesses giving their recollections of a series of events that took place in 1971–1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no

discrepancies it might be suggested that they have concocted their accounts of what happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

And in the case of *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234 Wan Yahya J (as His Lordship then was) stated:

... Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly toothcombed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconciliable, ambivalent or negational that his whole evidence is to be disregarded.

Identification of the witnesses at the identification/identity parade

[200] It was contended that there were numerous irregularities in the conduct and record of the identity parade which threw doubt on the identification of the three accused as having been responsible for the killings. In the instant case, however the eyewitnesses, Pragash, SP2, Satisgopal, SP3, Satis, SP4 and Thambi, SP5 all gave evidence that they knew the three accused prior to the events on the fateful night. This has been alluded to earlier. To that extent the identification parade is of less importance than if the accused had been unknown persons whom the eyewitnesses had to identify. In any event, it is clear that the eyewitnesses between them identified the three accused as well as two others as persons who were present at the place of the incident. They had also gone on to give statements to the police as to the identity of the assailants of each of the victims, as well as their individual participation, prior to the identification parade. Accordingly the alleged irregularities in the identification parade are of no real consequence. As stated in *Public Prosecutor v Basar* [1965] 1 MLJ 75 at p 76:

... I had no reason to quarrel with his general statement on this point *but what he, in my opinion failed to appreciate was that there was positive evidence about the identity of the respondent by PW1 who admittedly had known him for some time and had seen his face by the flashes of lightning.*

[201] In like manner, the eyewitnesses here had known all the accused prior

to the incident and their identification of the assailants differs from an identification where the witnesses had never seen or known the persons alleged to have committed the offence.

Summary of the evidence connecting the third accused, Sivan to the stabbing of Boy

[202] The evidence of Satisgopal, SP3 in relation to this incident is as follows. In examination in chief:

A: Sivan menikam Boy dengan pisau. Sivan mengugut saya dan kawan-kawan saya jangan mendekatinya, kalau tidak dia akan mencederakan mereka semua.

Q: Kemudian kamu kata kamu nampak Sivan telah menikam Boy dengan pisau. Bila?

A: Semasa Murali dan Raguram jatuh ke tanah, Sivan menikam Boy.

Q: Apakah nama betul Boy?

A: Thiagarajan.

Q: Adakah kamu nampak Sivan tikam Boy di mana?

A: Di bahagian dada (centre of the chest).

Q: Sivan menikam Boy dengan gunakan tangan mana?

A: Tangan kanan.

Q: Berapa kali Sivan menikam Boy?

A: Satu kali.

Q: Semasa Sivan menikam Boy, adakah dia memegang apa-apa benda?

A: Tidak.

Q: Berapa jauh jarak dengan kamu dan tempat Sivan menikam Boy?

A: 1.5 meter.

Q: Ada dengar apa-apa jeritan apabila Boy ditikam?

A: Tidak.

Q: Selepas Sivan menikam Boy, apa berlaku kepada Boy?

A: Boy terus jatuh ke tanah.

In cross-examination:

Q: Setelah Murali jatuh apa berlaku?

A: Selepas Murali jatuh ke tanah saudara-mara yang ada di sana datang mengangkat Murali. Selepas itu Sivan menikam Boy di dada.

[203] Satis, SP4's evidence has been set out above and describes in some depth and detail the attack upon Boy by Sivan. Thambi, SP5's evidence was as follows in examination-in-chief:

A: ... Sewaktu abang saya jatuh, kawan-kawan saya Thiagarajan (Boy) telah pergi memegang abang saya. Bila Murali jatuh, Boy pergi memegangnya. Sivan telah tarik abang saya dan menikam Boy.

Q: Selepas Sivan menikam Boy apa terjadi kepada Boy?

A: Pisau telah terpacak (lodged) di tengah dada (points to centre chest). Sivan telah memusingkan pisau dan keluarkannya dari dada Boy. Kemudian Boy jatuh.

Q: Berapa jarak di antara kamu dengan dan tempat di mana Sivan menikam Boy?

A: Lebih kurang tujuh meter.

Q: Adakah kamu nampak dari mana Sivan datang bila tikam Boy?

A: Dia berdiri, di depan kuil pada masa itu dan menari sebelum tikam Boy.

Q: Bagaimana cara Sivan menikam Boy?

A: Dia tarik abang saya, meleraikan abang saya Murali baru menikam Boy.

Q: Menikam dari hadapan Boy?

A: Ya.

Q: Adakah kamu nampak sesiapa tikam Boy selain Sivan?

A: Tidak.

In the course of cross-examination:

Q: Saya cadangkan kepada kamu bahawa kamu tidak lihat Sivan menikam Boy.

A: Tidak setuju.

Q: Saya cadangkan bahawa awak tidak nampak Sivan tikam Boy.

A: Tidak setuju.

Q: Ada nampak darah di baju Boy?

A: Ya, saya ada nampak tetapi sikit sahaja di bahagian dada depan.

A Q: Dalam keadaan kelam kabut bolehkah awak masih lihat Sivan menikam Boy?

A: Masih boleh.

B

[204] In totality it is clear that the three witnesses, Satisgopal, SP3, Satis, SP4 and Thambi, SP5 witnessed the stabbing of Boy by Sivan. They also corroborated each other's evidence in material particulars. Further independent corroboration came from the evidence of the pathologist, SP20 who confirmed that there was it was the stab wound inflicted to his chest and C which penetrated to his heart that was fatal. He also confirmed that such a wound was caused by a sharp and narrow weapon such as a knife, which is also consistent with the eyewitness accounts. Given the entirety of the evidence of the witnesses, the court concludes that there were no material D contradictions in the evidence of the eyewitnesses in relation to the stabbing of Boy by Sivan.

Issue (a): The prosecution failed to call a material witness, one Jeganathan a/l Selvaraj whose testimony if available would be adverse to the prosecution case; E accordingly s 114(g) should be invoked against the prosecution for such failure to produce relevant evidence

[205] The issue for consideration here would be whether the prosecution F deliberately withheld evidence which, if produced would have been adverse to its case. The evidence of the investigating officer, SP21 was that Jeganathan a/l Selvaraj ('Jeganathan') was not able to identify any of the suspects in the identity parade as being involved in these incidents. This is borne out by exh P12 which also states the same.

G

[206] The prosecution's contention therefore was that if Jeganathan had been called he would not have been able to identify the persons who had inflicted the injuries on the three deceased. Such evidence is not per se, adverse to the prosecution. While it does not support the evidence of the H eyewitnesses, it does not also show or suggest that the eyewitnesses are mistaken or are not telling the truth. It neither adds to nor detracts from the evidence. Accordingly the prosecution decided that this evidence was of no value to its case and chose not to call the witness. The position in law has been summarised in numerous cases including *Seneviratne v R* [1936] 3 All I ER 36, at p 49 it as held:

> Witnesses essential to the unfolding of the narrative upon which the prosecution case is hosed must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the prosecution.

[207] The issue therefore is whether Jeganathan can be termed a witness 'essential to the unfolding of the narrative upon which the prosecution case is based'. This is clearly not the case. The prosecution case is reliant on the evidence of Pragash, SP2, Satisgopal, SP3, Satis, SP4, Thambi, SP5, the pathologist, SP20, and the other witnesses who gave evidence of matters before and after the incident. Jeganathan cannot be said to be essential to the unfolding of the narrative. If there had been no eyewitnesses, and Jeganathan was one of the witnesses present at the scene then his evidence might well have been essential. As this was not the case here, it could not be said that the prosecution withheld evidence that was prejudicial to its case. Further support is found in *Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510, it was held that:

> A presumption that evidence not adduced would have been against the party failing to call need not be drawn in every situation. No such presumption would operate unless the witness not produced was essential.

[208] Further, the prosecution offered Jeganathan as a witness to the defence at the end of the prosecution's case. Upon a full consideration of these facts, s 114(g) of the Evidence Act 1950 did not require to be invoked.

Issue (b) There was a failure to conduct a complete and detailed investigation in this case resulting in numerous doubts arising in respect of the case against the third accused, Sivan

[209] As referred to earlier on in this judgment, there were several shortcomings in the investigation process, particularly in the failure to procure blood samples from the alleged assailants for comparison and analysis against the clothing, person and personal effects of the victims. The delay in the furnishing of the blood samples also caused such severe decomposition of those samples that they no longer portrayed a true reflection of the physiology of the victims at the time of death. The photographic evidence taken in the instant case, could also have been better. The issue that arises for consideration is whether these omissions or failures tainted the investigation of the case such that the search for the identity of the assailants was irretrievably precluded/lost.

[210] The net effect of the failures in the investigation, although serious, was to possibly deprive the court of the benefit of DNA analysis which may have contributed to the findings. I say 'may have' because it is by no means certain that further analysis would as of right have produced such results. As such the court has less evidence on which to make its decision. Here the court's determination will therefore primarily be based on the eyewitness accounts.

Did the third accused, Sivan stab Boy with the intention of causing death or with the intention of causing bodily injury to Boy, and is the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death?

[211] This material and complex fourth ingredient of the charge against the third accused, comprises two parts, namely:

(a) whether the third accused, Sivan in inflicting the stab wound on Boy did so with the intention of causing death or with the intention of causing that particular bodily injury to Boy; and

(b) whether the bodily injury intended to be inflicted and so inflicted is sufficient in the ordinary course of nature to cause death.

Whether the third accused, Sivan in inflicting the stab wound on Boy did so with the intention of causing death or with the intention of causing that particular bodily injury to Boy

[212] On a consideration of the entirety of the evidence it appears that there was an intention of causing death or causing that particular bodily injury to Boy because Sivan inflicted a single but deep penetrating wound at the centre of Boy's chest which as described in detail earlier proved to be fatal. The utilisation of the knife to pierce a particularly vulnerable part of the body, located which affected his heart, coupled with the words uttered to Boy show a clear intent to cause serious bodily injury to Boy in the region of his heart. The depth of penetration of the knife into Boy's chest of seven centimeters, reflects the force with which the knife was plunged into his chest piercing his heart. At this, the prima facie stage, the blow taken in conjunction with the surrounding circumstances in which Boy was stabbed suggest that this ingredient was made out.

Were the bodily injuries intended to be inflicted and so inflicted sufficient in the ordinary course of nature to cause death?

[213] The evidence of the pathologist, SP20 is relevant here. This is what he said:

Q: Pada pandangan doctor, secara lazimnya adakah luka di jantung boleh menyebabkan kematian?

A: Pada lazimnya kecederaan di jantung boleh menyebabkan kematian dengan cara si mati kehilangan banyak darah dan boleh menyebabkan jantung tiba-tiba berhenti.

Q: Dalam kes ini adakah si mati kehilangan banyak darah atau jantung berhenti?

A: Dalam kes ini dua-dua boleh berlaku.

Q: Pada kebiasaannya apakah peluang seseorang yang mengalami tikaman kepada jantung untuk hidup?

A: Peluang untuk hidup tipis kerana kecederaan ini boleh menyebabkan darah keluar begitu cepat.

[214] As stated by the pathologist, SP20, Boy did in fact die soon after he was stabbed, the likely causes being both the loss of copious and significant amounts of blood as well as the heart ceasing to beat. In this context, it is relevant to note that the blood loss collected in the victim's left chest cavity. The pathologist, SP20 gave evidence of the wound and its manner of penetration through Boy's chest as being an elliptical shaped stab wound measuring 2.5cm which was directed into his chest downwards and towards the centre. It had penetrated Boy's left chest cavity at the level of the fourth rib and then infiltrated the pericardial sac and injured the heart. The depth to which the wound had penetrated was seven cm, which is a considerable depth. There were 500ml of blood in his left chest cavity and his fourth left cartilage bone had been sliced. The wound had cut through the outside wall of his heart through to the inter-ventricular wall of the heart. Given the critical nature of the wound which had affected a vital organ, namely the heart, the pathologist SP20 concluded as above that the injury to Boy would in the ordinary course of nature cause death. SP20's evidence on this aspect was not challenged during cross-examination. The court therefore concludes that the injury suffered by Boy was sufficient in the ordinary course of nature to cause death.

[215] Given the foregoing conclusions on the numerous issues raised and ventilated, the court concludes that the prosecution has succeeded in establishing a prima facie case against the third accused, Sivan in respect of the murder of Boy as charged. As a consequence in keeping with s 180 of the Criminal Procedure Code, this court hereby calls upon the third accused, Sivan to enter his defence to the charge made against him under s 302 of the Penal Code.

Was a prima facie case made out against Bontal, the first accused?

[216] The charges against the first accused Bontal were that he did with intention conspire to commit murder, causing the deaths of Raguram and Murali which offences are punishable under s 302 of the Penal Code read together with s 109 of the Penal Code. Section 109 of the Penal Code provides as follows:

A ... Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation — An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance
B of the conspiracy, or with the aid which constitutes abetment.

[217] In essence therefore the charges against Bontal are that he aided or abetted Lobo in causing the deaths of Raguram and Murali, where Lobo's acts
C of stabbing Raguram and slashing Murali's neck was committed in consequence of Bontal's aid or abetment. Was there evidence to satisfy this charge brought against Bontal?

A summary of the evidence against the first accused, Bontal in relation to the
D *deaths of Raguram and Murali*

[218] Satisgopal, SP3 gave evidence during the course of examination in chief that Bontal was in the vicinity of where Raguram and Boy were killed.
E According to him, after Sivan had stabbed Boy, Bontal who had a knife (which he later clarified was a long knife or 'parang') and thrust the weapon towards him when he went towards Bontal. Satisgopal then said that he caught hold of the knife, while Bontal hit him with a helmet. In the course of cross-examination by counsel for the first accused, Bontal, he maintained
F that the only injury he had sustained that night was from being hit with a helmet. He also maintained that he had wrested the knife held by Bontal away from him without injury to his hand.

[219] This evidence therefore had the effect of placing Bontal at the scene
G of the incidents and of a fight between him and Satisgopal, SP3 after the incidents.

[220] Satis, SP4 gave evidence that after Boy had been stabbed by Sivan, he and the others had tried to run after Lobo and Sivan. At about this time,
H according to him, Bontal pushed him to the ground. He got to his feet and saw that Sivan and Bontal were still standing there. Satis, SP4 ran towards the tent and watched people fighting. When he went out of the tent, Bontal held him by his shirt. According to him he pushed Bontal who fell to the ground. After that he was busy helping the injured persons. Again the effect of this
I evidence is only to place Bontal at the scene of the incident.

[221] Thambi, SP5 gave evidence that he saw Bontal together with the second accused, Lobo and the third accused, Sivan outside the Mariamman temple prior to the incidents that night. According to him, they were there

together with one Anbarasu, SP13 and his brother, Sonyrajah. The drums were playing and Bontal, Sivan and Anbarasu were dancing. According to Thambi, SP5 they were close to the area where Raguram was stabbed, about three metres away. After Raguram was stabbed and Murali intervened, this witness stated that while he could not really remember he recalled seeing Bontal running behind his cousin brother Murali and Murali holding his neck. He could not recollect what Bontal was doing when he ran behind Murali towards the tent.

[222] In cross-examination he confirmed that he had seen Bontal running away with a knife which he said was about two feet long.

[223] This then was the totality of the evidence available against the first accused, Bontal in respect of the charges brought against him. There was no discernible evidence from which it was evident or could be inferred that Bontal had conspired with Lobo to abet in the killing of Raguram and Murali, such that those killings ensued as a consequence of the aid/abetment given by Bontal. The facts testified to by the eyewitnesses, namely that Bontal was present with Lobo prior to the incident, that he was very close to Lobo when both attacks were perpetrated against Raguram and Murali, that he was armed with a knife, that he participated in a fight after the events with Satisgopal, SP3 and Satis, SP4 before running away behind the tent and towards the back of the flats do not support the charges of a conspiracy to murder. It is not possible to infer from his conduct that evening that he had conspired with Lobo and provided abetment for the commission of the murders. Neither was there evidence to show that the murders were committed as a consequence of any instigation by Bontal or in pursuance of a conspiracy. There was no evidence of a conspiracy. Counsel for the prosecution contended otherwise. He submitted that it was sufficient that Bontal had been present at the scene, had aided Lobo and Sivan by preventing Satisgopal, SP3 and the others from going after them, and had wielded a knife at the eyewitnesses in an effort to threaten them. This it was submitted all showed that he was aiding and abetting Lobo in the commission of the offences. He also relied on *Ferguson v Weaving* [1951] 1 KB 814 where Lord Goddard CJ said:

> It is well known that the words 'aid and abet' are apt to describe the action of a person who is present at the time of the commission of an offence and takes some part therein.

[224] However on the evidence of the eyewitnesses it is not possible to conclude that Bontal took part in the actual inflicting of wounds on Raguram and Murali. Neither can it be concluded that he in any way participated in

A the acts that gave rise to the injuries on these two victims. He neither held them down nor physically assisted Lobo in any way.

[225] In *The Queen v Contey & Ors* (1882) 8 QBD 534 it was determined that to constitute an aider or abettor, some active steps had to be taken by
B word or action, with the intent of aiding the principal or principals. Hawkins J put it thus:

> ... It is no criminal offence to stand by, a mere passive spectator of a crime even of murder. Non-interference to prevent a crime is not itself a crime. But the fact that
C a person was voluntarily and purposely present witnessing the commission of a crime and offered no opposition to it, though he might reasonable be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances afford cogent evidence upon which a jury would be justified in finding that he willfully encouraged and so aided and abetted. But it would be
D purely a question for the jury whether he did so or not. So if any number of persons arrange that a criminal offence shall take place, and it takes place accordingly, the mere presence of any of those who so arranged it would afford abundant evidence for the consideration of a jury for an aiding and abetting.

E **[226]** While it is true that Bontal was indeed present and may well have witnessed the commission of a crime, there is no evidence to show on the other hand that he willfully encouraged the commission of those offences in any way. Particularly with regards to Murali, who intervened whereupon Lobo slashed his neck. Bontal cannot be said to have anticipated this and
F willfully encouraged it given the short space of time within which it occurred and the general mayhem all around. There was also no evidence that Bontal had arranged with Lobo that there should be an attack on Raguram followed by Murali. In the absence of any cogent evidence on this point this court can only conclude that a prima facie case has not been made out against him. *In*
G *accordance with s 180 of the Criminal Procedure Code, the first accused, Bontal stands acquitted of the charges brought against him*.

[227] On 31 January 2008 the court pronounced its decision in respect of the three cases at the close of the prosecution's case. Bontal was acquitted and
H Lobo and Sivan called upon to enter their defence.

THE DEFENCE CASE FOR THE SECOND ACCUSED, LOBO

[228] On 28 March 2008 the defence case for the second accused, Lobo
I commenced. After having understood the three options available to him, namely giving evidence, giving a statement from the dock or simply remaining silent, Lobo elected to give evidence on oath. His version of the events of the night of 18 September 2004 was simple. He stated that at about 9pm that night he received a telephone call from one Anbarasu a/l

Thangavelu, SP13 ('Anbarasu') inviting him to accompany Anbarasu to the Vinayagar temple. They both worked together at a place known as Kosan Rubber Industry. Anbarasu arrived to pick Lobo up between 9.45pm and 10pm. They arrived at the Vinayagar temple at about 10.10pm. After going into the Vinayagar temple, they both made their way to the Mariamman temple which was a ten minute walk away. They reached the Mariamman temple at about 10.20pm. Outside the temple, Lobo testified that he saw some of his friends who were listening to the sound of drums being played within the temple. He named his friends as Elavarasan, Thiagarajan, Manisegaran and Sonyrajah. They all stood around, immediately in front of and to the side of the Mariamman temple, listening to the music, waiting for the chariot to arrive. Lobo maintained that he knew one of the musicians who was playing the drums that night, one 'Suresh', the elder brother of the third accused, Sivan. His real name is Jeganathan a/l Kandasamy though he is generally called 'Suresh'. Lobo stated that he saw Suresh who saw him too.

[229] Lobo further testified that he saw Raguram and Murali, two of the deceased persons when he arrived at the temple premises. Bontal and Boy arrived subsequently. Lobo confirmed that he knew Murali for a period of about ten years, as they had previously been neighbours at the JKR quarters. In cross-examination he maintained that they were good friends. He had also seen Boy previously, although he did not know him. Bontal is Lobo's cousin. There was no animosity or enmity between Lobo and Murali, Raguram or Boy. Lobo went on to testify that Murali and Raguram were inside the tent when he arrived, while Boy came later to the front of the Mariamman temple. According to Lobo, he could see that Murali and Raguram were both drinking beer from cans. Murali asked Lobo to join them, but Lobo said he would do so later. In the meantime, Sivan and Bontal were both standing next to Boy outside the Mariamman temple.

[230] Lobo also testified that he saw Pragash SP2, Satisgopal SP3 and Datchinamoorthy, SP5 while standing outside the temple. They were all dancing. Boy, Sivan and Bontal were also dancing at the side of the temple where they had positioned themselves. Lobo was standing relatively near where they were dancing, about three metres away.

[231] As for the lighting that night, Lobo maintained that the area within the tent was lit, and was therefore bright. The area immediately outside the tent was also lit by the coloured bulbs fixed around the tent. The temple meanwhile was lit by fluorescent lights and therefore was bright. So was the area outside the temple where they were all standing, according to Lobo. However he stated that the area between the temple and the tent was dark. As for the road along which the chariot would travel, it was lit by a street lamp and that area was accordingly bright too.

[232] Lobo went on to explain that there was one group of people dancing in front of the tent, ie, in front of the temple, and another group on the main road where the chariot would eventually travel. He suddenly heard shouts from several people to the effect of 'Fight! Fight!' in the Tamil language. The crowd which had now swelled considerably started to panic and people started running in all directions. According to Lobo, as he looked back, he saw that persons wearing full-faced helmets had penetrated the crowd that was dancing along the main road where the chariot would eventually travel, which was perpendicular to the Mariamman temple. When he saw this, Lobo and Anbarasu then immediately left the area by walking towards the right, past the Mariamman temple. Lobo maintained that he did not know what happened to Bontal, Sivan and Boy or anyone else that night as he left the area immediately upon hearing that a fight had started. Lobo went home to bed and on the following day maintained his normal routine at home.

[233] In the following days, Lobo was informed by his father that his picture had been published in the newspapers linking him to the deaths of the victims. He therefore took his father's advice and presented/gave himself up to the police on 24 September 2004, whereupon he was remanded. An identification parade was held on 2 October 2004. According to Lobo, one hour before the identification parade, ASP Othman, SP21, took Bontal and Lobo to an office where SP5, Datchinamoorthy, SP2 Vinod, SP3 Maran, one of the victims' and another person were present. Then, Lobo testified, ASP Othman told the two relatives of the victim that he and Bontal were responsible for the death of their relative, Murali. Lobo and Bontal were then taken back to their cells and the identification parade commenced an hour later.

[234] In the course of cross-examination, Lobo denied that he had stopped reporting for work with effect from 19 September 2004 as a consequence of the incidents of 18 September 2004. He also maintained that he learnt about Murali's death from his family on the night of 19 September 2004, but chose not to visit Murali's family because he did not want to 'add to their sadness'.

[235] As for Raguram, Lobo stated in cross-examination that he had known him for about two to three years, while he had seen Boy two to three times prior to the incident resulting in their deaths. He agreed that although these deaths had been the talk of the neighbourhood in the following days, he was disinterested. He maintained that it was difficult to identify persons that night because it was very crowded. Notwithstanding this, he stated that he could clearly see the persons identified by him.

THE DEFENCE CASE FOR THE THIRD ACCUSED, SIVAN

[236] Sivan also chose to give evidence on oath. He stated that he was

eighteen years old at the date of the incident. He had been educated up to the level of Form Four and was unemployed at the time of the incident. He stayed at home with his family comprising four other siblings. Sivan explained that he had known Boy for a period of seven years and was very close to him. They met almost daily and went out together. They had never fought. On 18 September 2004 Boy came to Sivan's house at about 3pm. He asked Sivan to accompany him to the temple to watch the chariot procession that night. They left the house at about 10.20 to 10.30pm and used Boy's motorcar to get to the Vinayagar temple. Boy parked his car along the main road behind the temple, and they both then went on foot to the Mariamman temple. At the Mariamman temple Sivan saw that drums were being played. His elder brother, one Jeganathan s/o Kandasamy, also known as 'Suresh' was one of the drummers in the group.

[237] Sivan noted the presence of Lobo, Anbarasu and four or five others on arrival at the temple. According to Sivan, he knew Lobo, but had not spoken to him before the night of 18 September 2004. Bontal was also present and stood quite close to him and Boy. Sivan and Boy stood watching the drum recital. There was a group of people dancing in the area between the temple and the tent. Sivan, Boy and Bontal joined in the dancing.

[238] Sivan also maintained that he saw SP2, Pragash, SP3 Satisgopal, and SP5 Datchinamoorthy that night although he did not recall seeing Satis, SP4, They were all dancing in front of the tent, according to Sivan. Murali and Raguram, whom he also knew, were sitting inside the tent. He clarified in cross-examination that they were sitting on chairs. They were not drinking or holding beer cans when he saw them.

[239] Sivan went on to explain his relationship with each of the eyewitnesses in this trial. He had known SP2, Pragash for about four to five years and had spoken to him on occasion. They were not close friends. He knew SP4, Satish Krishnan but was not friendly with him. As for SP3, Satisgopal, Sivan stated that he had known him since he was young, but they were not close friends. SP5, Datchinamoorthy was described by Sivan as being a close friend whom he had known since he was a child. He claimed to be close to SP5. Moreover, Datchinamoorthy lived close to Sivan. In summary Sivan testified that he harboured no ill-feeling or animosity towards any of these witnesses. There had been no disagreement between them. Neither was there such animosity between Boy and these witnesses.

[240] According to Sivan approximately one to two minutes after they had started dancing, a number of persons wearing 'full-face' helmets went into the tent. Although he could not estimate the number, he maintained that there were many of them. Immediately after this, everything became confused

because there were shouts of 'Fight! Fight!' in Tamil. He did not however see any fighting in the tent. Sivan immediately went into the temple to look for his brother. Sivan maintained that he found his brother, Suresh and ran with him to the area of the flats where the motorcycle Suresh had used to travel to the temple, was parked. It belonged to their father. They both then left on the motorcycle and went home, which is situated at Tepi Sungai, not far away. Suresh rode the motorcycle while he sat at the back. Although Suresh (as will be seen later) stated that he ran with Sivan holding the drum he was playing, neither he nor Sivan mention who held the large drum while they were fleeing home. On reaching home, Sivan stated that he ate and went to bed. As for Boy, Sivan testified that he had no idea what happened to him. He did not see Boy running away in any direction. He also did not attempt to look for Boy. Subsequently on reaching home, he did not attempt to ascertain what had happened to Boy, or if he had reached home safely. He had Boy's handphone number but did not attempt to call him. When this was put to him in the course of cross-examination, he maintained that he could not make any such call as there was no telephone at home, and the nearest telephone was some half a mile away. The gates to his house moreover, had been locked by his mother so he could not get out to make the call.

[241] In cross-examination he maintained that although Boy was a mere half a metre away from him, he did not see what had happened to Boy. He could however see his brother Suresh in the temple about five metres away. Sivan also agreed that in the melee that had transpired, it would have been easier for him to grab Boy's hand and run away rather than to run to look for Suresh.

[242] Sivan stated that he did however, see Lobo running away and noted that Lobo did not run in the direction of the flats. The flats are situated alongside the tent, but further along the road. According to him, Lobo ran along the main road that the chariot would traverse. When it was put to him in cross-examination that he could not have seen Lobo as he was running in the opposite direction, he agreed. However in the course of re- examination he clarified that as he left the temple holding his brother's hand, he saw Lobo and Anbarasu running away along the main road. Sivan in short, maintained that he was simply not present at the time of the incident resulting in the deaths of Raguram, Murali, and his best friend, Boy.

[243] As for Boy's funeral, Sivan stated in examination in chief that he visited Boy's grandmother's house the following day, ie, 19 September 2004 at about 3pm for the funeral with his parents and siblings. Boy's grandmother's house was situated close to his house.

[244] In the course of cross-examination, Sivan stated that he was informed

about Boy's death when he woke up on the morning of 19 September 2004 by his parents. Sivan first testified that he went to the funeral at 10am on 19 September 2004, but when told that at 10am, Boy's body was still at the mortuary, answered that he could not recall when he went to the funeral. He then went on to say he went in the evening. He also stated that he went twice. However he did not express his condolences to anyone present there.

[245] Sivan was arrested twenty-six days after the incident, in Pulau Carey, at his uncle's house where he had gone for prayers and a holiday. An identification parade was held. Sivan maintained that prior to the identification parade he was taken to a room by ASP Othman where he saw Pragash, SP2, Datchinamoorthy SP5, and Satish Krishnan, SP4. According to him, ASP Othman pointed to him and stated that he had killed Boy. He was then taken back to his cell and the identification parade commenced an hour or two later, where he was duly identified by the eyewitnesses.

The evidence of Nagathevan a/l Manoharan or Bontal, SD3

[246] Bontal who was acquitted at the prima facie stage, gave evidence corroborating both Lobo and Sivan's version of events. He stated that he left for the Mariamman temple on the night of 18 September 2004 at about 10.50pm. He went alone on his motorcycle. He reached the temple after about twenty minutes. He parked his motorcycle outside the temple where some cars had been parked. The area was crowded when he arrived. After parking his motorcycle, he noticed that his friends were there and went to speak to them. His friends were Boy, Lobo and Sivan. He also saw Anbarasu and three or four others whose names he could not recall. He spoke to Lobo and Sivan, whom he said, were standing together. He later clarified that Lobo was standing some three to four metres away.

[247] Bontal testified that he knew SP2, Pragash and SP3, Satisgopal but not SP4 and SP5. He agreed in the course of cross-examination that there was no enmity between him and the eyewitnesses. He also knew Murali and Raguram. He had known Murali for about three years, and been to his house two months prior to the incident. He got to know Raguram through Murali. With regards to Boy however, whom he had earlier described as his friend, he maintained that he only knew him from 18 September 2004.

[248] On the night of 18 September 2004 he said that he saw Pragash, SP2 and Satisgopal, SP3 at the edge of the tent-like structure in front of the temple. They were drinking alcohol according to him. Murali and Raguram were in the tent. Bontal, Sivan and Boy went to dance in front of the temple. After about ten minutes, people started to run and shout. He heard someone shouting 'Slashing'. According to him, he, Sivan and Lobo all ran away. Boy

however went towards the tent-like structure. Sivan ran towards his brother in the temple, according to Bontal. Bontal knows Sivan's brother, Suresh. Lobo he maintained ran towards the Vinayagar temple. He saw Sivan talking to his brother but could not hear what was said. He in turn ran straight to his motorcycle and went home.

[249] He subsequently gave himself up to the police when his picture was published in the newspapers in connection with the deaths of the three victims.

[250] In the course of cross-examination, Bontal demonstrated how long it took him to get to his motorcycle from where he was standing outside the temple. It took him approximately three seconds. Bontal maintained that it took him a while longer to put on his helmet and unlock the motorcycle. It was put to him that in the short space of time that it took him to leave the temple, he could not have noted all the movements of key witnesses as he had described. Bontal disagreed. In the course of re-examination, he stated that it took him ten minutes to leave the temple. When asked why, he stated, for the first time, that it took him under ten minutes because the lock to his motorcycle was 'stuck'. Accordingly he maintained that he was therefore able to witness the movements of Lobo and Anbarasu as well as Sivan and Suresh and Boy. He did not however in this time note what had happened to any of the victims or the eyewitnesses.

The evidence of Jeganatham a/l Kanthasamy, 'Suresh', SD4

[251] Suresh, SD4 who is Sivan's elder brother gave evidence that he left his home at 8.30pm on the night of 18 September 2004 to go to the Vinayagar temple. He used his father's motorcycle and on reaching there, said his prayers before leaving for the Mariamman temple by motorcycle where he was participating in a musical recital with six or seven others. He parked his motorcycle in front of the JKR flats, alongside and in front of the tent that had been erected facing the front of the Mariamman temple. When he began to play at the temple around 9.10pm he stated that he saw Lobo outside the temple with some of his friends, including Sonyrajah and Anbarasu. He saw Sivan arriving with Boy.

[252] He also stated that he saw the four eyewitnesses dancing in front of the temple close to the tent, when he was playing the drums during the musical recital. And he saw Murali and Raguram standing inside the tent.

[253] When the musicians were playing the second piece, Suresh maintained that he heard people shouting and he saw his brother Sivan running in his direction. Sivan told him that there was a fight at the temple

gates and that he was frightened. Sivan took hold of his hand and asked him to come home. Suresh said that as he held his brother's hand and pulled him, he asked about Boy's whereabouts Sivan told him he did not know. As he left the temple he saw four or five persons wearing full-faced helmets fighting in the tent and outside the tent. According to Suresh they ran towards the flats. He too saw Lobo and Anbarasu run towards the Vinayagar temple, while Sonyrajah ran towards the tent. They then went home. In essence, Suresh's evidence corroborated Sivan's version of events.

[254] In the course of cross-examination, Suresh explained that five or six songs were to be performed that night. He agreed that there was a large audience with layers of people standing in front of him as the temple was very crowded. He also agreed that he had to concentrate on playing the drums, which he did from memory. However, apart from Anbarasu, Lobo, Bontal, Boy and Sivan he claimed that he did not see anyone else that he knew. And this, despite the fact that he did not know Lobo and Anbarasu.

[255] Suresh also explained in cross-examination, that the drum that he played belonged to the temple and was routinely stored there. On the night in question, although he was extremely scared and concentrated solely on getting home safely with his younger brother, he maintained that he carried the temple drum as he ran towards the motorcycle and fled home.

[256] The defence upon being informed that the witness known as Jeganathan a/l Selvaraj could not be located for the purposes of service of a subpoena, sought to have his statement made under s 112 of the CPC submitted as part of the evidence comprising the defence case. For the purpose, ASP Othman, SP21 was recalled and the said Jeganathan's statement tendered. The attempts made to serve a subpoena on the said Jeganathan was also tendered in the form of a report and marked as exh D32. The defence then closed its case.

A CONSIDERATION OF THE EVIDENCE AS A WHOLE

[257] At the close of the defence, the court then embarked upon a reading of the evidence on record as a whole, so as to give consideration to the entirety of the evidence in the context of both the prosecution and defence case. Having done so, it was evident that there is before the court two starkly different versions of the events of the night and early morning hours of 18 and 19 September 2004. While the prosecution's case, in essence, vide the eyewitnesses corroborated by the pathologist, placed the cause of the deaths squarely on Lobo and Sivan, the defence case was that Lobo and Sivan were simply not present at the time of the killings and deaths of the three victims. In short they denied that they had caused the deaths. Their defence also

tacitly suggested or implied that the deaths of the three victims had been caused by the persons clad in full-faced helmets, whose identities were therefore unknown.

THE DUTY OF THE COURT AT THE CLOSE OF THE DEFENCE CASE

[258] In accordance with s 182A of the CPC, the duty on the court at the close of the defence case is set out as follows:

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[259] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, the Federal Court defined 'proof beyond reasonable doubt' thus:

> Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

And in *Public Prosecutor v Mohd bin Mohd Razali & Ors* [2002] 5 MLJ 406:

> It is clear that at the end of the trial, the court will have to weigh all the evidence that had been adduced and to make a ruling whether the prosecution has proved its case beyond reasonable doubt or otherwise.
>
> Having weighed the evidence if the court is satisfied that the prosecution has proved the charge beyond reasonable doubt, the court will have to find the accused guilty of the charge and thereafter convict him. On the other hand, if the court rules that the prosecution has not proved the charge on the evidence adduced

against the accused, then the accused will be acquitted and discharged. In other words, at the end of the trial the court will have to rule whether the defence has raised a reasonable doubt as to the truth of the prosecution's case or the guilt of the accused. This is because a case which has been proved beyond reasonable doubt in itself involves the absence of a reasonable doubt. In support of the said proposition reference may be made to the case of *Mah Kok Cheong v R* [1953] MLJ 46 where His Lordship Spencer Wilkinson J at p 47 stated the following:

> ... In ordinary criminal cases, all discussions as to what might reasonably be true or what is consistent with innocence is both irrelevant and misleading. Almost every defence put forward by an accused is consistent with innocence or it would not be put forward or it would not be a very good defence it could not reasonably be true. But whatever may be the defence to a criminal charge the sole question which a subordinate has to ask itself at the conclusion of the trial is — Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's built? I say 'the sole question' advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first proved a case.

And in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, Sharma J stated as follows in explaining 'reasonable doubt':

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the change.

And Thomson CJ in *Liew Kaling & Ors v PP* [1960] MLJ 306 relied on the definition expressed by Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the last probable' the case is proved beyond reasonable doubt but nothing short of that will suffice.

[260] Finally in *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 the court stipulated as follows:

> Underbill's treatise on *The Law of Criminal Evidence* (5th Ed, Vol 1, at p 34) where the learned author states as follows: The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. *A vague conjecture or an inference*

> *of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way*. There must be a candid consideration of all the evidence and if after this candid consideration is had by the jurors, there remains in their minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt. (Emphasis added.)
>
> In our judgment, the learned judge's direction unto himself amply met the requirements suggested by the learned author in the aforesaid passage with which we wholly agree. It is only after a careful analysis of the evidence that he came to the conclusion that the accused had not raised a reasonable doubt.

[261] Bearing the aforesaid in mind, the evidence of the defence witnesses is now evaluated.

EVALUATION OF THE EVIDENCE PRESENTED BY THE DEFENCE FOR THE SECOND ACCUSED, LOBO AND THE THIRD ACCUSED, SIVAN

[262] Lobo, SD1's evidence linked his entire presence prior to, during and after the incident at the Mariamman temple with that of Anbarasu, SP13, who was a co-employee at his workplace. As such it is relevant to consider Anbarasu, SP13's, evidence as to the events of that night. As outlined previously, Anbarasu explained that he first went to the temple with his wife and children and then left them at his mother-in-law's house before returning to the temple again at about 9.30pm. He returned with a group of his friends to the Mariamman temple:

> A: Saya pulang semula ke kuil pukul 9.30 malam. *Saya pulang dengan kawan-kawan saya, Thenegaran (Lobo), adik saya bernama Rajah, Segar, Thivagar, Elavarasan dan ramai lagi, nama mereka saya tidak ingat*. Ada juga orang baru yang namanya saya tidak kenal. (Emphasis added.)

[263] The evidence of Lobo and Anbarasu differ to the extent that Lobo did not mention any of the other persons being present when Anbarasu picked him up from his home on the night of 18 September 2004. At no time in his evidence did Lobo mention any of these other persons, who were in fact arrested and remanded and who participated in identification parades held by the police.

[264] Anbarasu went on to describe in summary the events of that evening as follows:

> Q: Semasa sampai di kuil pukul 9.30, apa kamu tengok di kuil tersebut?
>
> A: Saya nampak orang menari di kawasan tersebut. Selepas beberapa minit

ada pergaduhan di tempat tersebut dan orang berlari tidak teratur. Tempat itu dalam keadaan kelam kabut, kecoh. Ada pergaduhan. Saya nampak pergaduhan dan lari. Di kawasan tersebut ada 200 orang, sesak keadaan gelap saya tidak dapat cam. Semua juga lari.

[265] Anbarasu went on to state that after the fight started, he became frightened and ran away straight to the Vinayagar temple, where he had parked his car. He drove straight home. His evidence to that extent corroborates Lobo's version of events. However nowhere in his evidence does he state that Lobo was with him or that he drove Lobo home. There is a glaring omission in this respect. Neither was it put to him at any time during cross-examination that he ran away with Lobo or that he drove Lobo home that night when he fled from the fighting.

[266] As for the fight that took place in front of the Mariamman temple, his evidence was as follows:

Q: Siapa yang terlibat dalam pergaduhan tersebut?

A: Ramai orang saya tidak tahu siapa yang terlibat dalam pergaduhan.

Q: Ada kamu tengok apa-apa senjata digunakan dalam pergaduhan?

A: Saya tidak tengok.

...

Q: Adakah kamu sendiri terlibat dalam pergaduhan?

A: Tidak.

Q: Ada kamu nampak rakan-rakan lain Thenegaran atau orang lain yang kamu namakan terlibat dalam pergaduhan?

A: Saya tidak nampak. *Thenegaran (Lobo), Rajah, Segar, Thivagar dan Elavarasan ada terlibat dalam pergaduhan.*

(Emphasis added).

[267] Therefore it also follows from his evidence that Lobo, amongst other of his friends, was involved in the fight. This evidence differs substantially from that of Lobo who maintained that he ran away with Anbarasu. With the above evidence, it is evident why there was an omission of Lobo's name when Anbarasu described how he fled. It was because he fled alone.

[268] Anbarasu's testimony specifies that Lobo and his other friends were involved in the fight from which he fled alone to his car and drove straight home.

[269] It is pertinent that at no time during the course of Anbarasu's evidence was he cross-examined on his statement as to Lobo's participation in the fight. His statement on this issue stands unrefuted. It therefore follows that there is a divergence in the evidence of Anbarasu and Lobo on this point.

[270] When Anbarasu and Lobo's version of events is viewed collectively the following differences arise:

(i) Anbarasu and Lobo went to the Mariamman temple on the night of 18 September 2004 between 9.30 and 10.30 pm. Lobo's testimony is that they went alone, while Anbarasu maintains that a large groups comprising Sonyrajah, Thivagar, Manisekaran, Elavarasan and others went together?

(ii) A fight broke out in front of the Mariamman temple. Lobo maintains that he ran away when the fight broke out, while Anbarasu testified that Lobo as well as his other friends participated in the fight;

(iii) Anbarasu stated that he became scared and went home. He does not mention Lobo. However Lobo maintains that he ran with Anbarasu to his car and was taken home by Anbarasu. These differences are material as they either place Lobo at the scene of the incident at the material time, on that night or remove him altogether from the scene of the crime that night.

[271] However, Sivan, SD2, Bontal, SD3 and Suresh, SD4 all corroborate Lobo's evidence. They all maintained, although they were not with Lobo, that in the course of the melee, they noted Lobo running away from the scene with Anbarasu. Their testimony is corroborative down to the details of the precise direction in which Lobo ran.

[272] The question that arises for consideration is whether their recollection of such detail given the events of that night is credible.

[273] Sivan's testimony was that he was so scared and concerned for his safety that he stopped dancing and immediately went to look for his brother, not even noticing where Boy, who was dancing less than a metre away, had disappeared. In spite of this however, he was able to pick out and note, from the mass of swelling and panicked persons, precisely where Lobo and Anbarasu went. This is unusual when it is considered that by his own account, he did not even know Lobo very well. His evidence on this issue becomes extraordinary when it is contrasted with his complete lack of knowledge or concern for Boy's whereabouts is considered. Even in the midst of a melee and a fight it is natural that persons would trace the whereabouts

of their dear and beloved ones. For Sivan to have a clear and precise sighting of Lobo, who is far less close to him than Boy, by his own testimony, is unusual.

[274] In any event, Sivan maintains that Lobo and Anbarasu went down the road marked 'P' and 'R' on the exh P-6; Lobo however testified that he went to the right of the Mariamman temple towards the Vinayagar temple along the direction 'TN'.

[275] Bontal, SD3's evidence too is that he saw precisely what happened to Lobo and Anbarasu although by his own physical demonstration in court, he was able to reach his motorcycle to leave the temple premises within a period of three seconds. It is possible that he did indeed especially pick out and note Lobo and Anbarasu's movements. However, given the very short time that it took him to leave the temple premises on his motorcycle it is unlikely that he could have noted the path that Lobo and Anbarasu took on foot. In an attempt to extend the time taken to leave the temple premises, he sought, in re-examination to explain that he had difficulty unlocking the lock on his motorcycle, but it was evident from the timing of this piece of evidence, that it was very much an afterthought.

[276] Suresh SD4, who corroborated Sivan's version of events, also seemed to have conveniently picked out and noted Lobo's movements from his place within the temple, while he was running out with Sivan. Again Lobo is not a close friend, and according to all the witnesses, there was a large crowd, but notwithstanding this, he appears to have been able to see and follow Lobo and Anbarasu through the crowds running away from the scene. As is the case with Boy, this evidence becomes extraordinary when it is considered that he was unable to place the whereabouts of any other witnesses that night. In this context, it must be recalled that he was participating in a drum recital with some six or seven players. According to Sivan and his version of events, upon Sivan reaching him, he left immediately, carrying the temple drum with him. However, Datchinamoorthy, SP5 testifies in his evidence that when the fighting started and the slashing and stabbing of the three victims transpired, the drums continued to be played. And Satish Kumar, SP4 recalled that the drums were intermittent in that they played and then stopped and played again. From their evidence it would appear that the music continued even after the fight started. Suresh's evidence did not touch on this issue. While this in itself does not detract from the veracity of his statements, it is telling that he did not explain whether the other musicians stopped playing and ran away or whether they continued to play their prepared pieces.

[277] Another unusual feature in Suresh, SD4 and Sivan's version of events relates to the temple drum. The drum, which is a large musical instrument,

apart from hindering their movements, would have had to have been held while Suresh, SD4 and Sivan left on their father's motorcycle. According to Suresh, he rode the motorcycle while Sivan rode pillion. Yet neither of them mentioned the large drum that Sivan would have been carrying, nor where it was placed on their ride home. In fact it is in evidence that the drum belongs to the temple and could simply have been left there instead of being carried away.

[278] The net effect of the evidence of the witnesses for the defence case, was to present an extremely careful and plausible account of the events of that night. Each of the witnesses was able to neatly corroborate each other's version of events. On a consideration of the totality of the defence evidence *in isolation*, it is indeed possible that Lobo and Sivan simply fled from the scene of violence on the night in question.

[279] However their evidence cannot be viewed in isolation. It has to be considered in conjunction with the evidence of the eyewitnesses and analysed in that context. The burden of proof remains at all times on the prosecution to prove its case. However in the context of analysing the defence evidence to ascertain whether it raises a reasonable doubt, it is still incumbent to consider the defence evidence in the context and in conjuction with the prosecution evidence so that the totality of the evidence is viewed as a whole. This falls to be considered next.

The evidence of the defence witnesses in the context of the eyewitness' accounts of the incident

[280] How then do the eyewitness accounts of Pragash, SP2, Satis Krishnan, SP4 and Datchinamoorthy, SP5 weigh against the evidence of the defence witnesses, Lobo, SD1, Bontal, SD2, Sivan, SD3 and Suresh, SD4? Again bearing in mind that the burden remains with the prosecution, it falls to be considered whether the veracity of the eyewitness evidence adjudged at the prima facie stage, remains so, in the context of the defence witnesses sworn evidence. The version of the eyewitnesses is wholly disparate from that of Lobo and the other defence witnesses. Their evidence is direct and specific, in that it tells how Lobo and Sivan utilised sharp instruments to inflict serious bodily injury on vital parts of the victims' bodies resulting in their deaths, as compared to the defence witnesses evidence that they were wholly absent from the scene at the time when these killings took place. In view of the divergent nature of the two versions, the two possibilities that arise are as follows. Either their version is concocted or it is true.

The eyewitnesses are 'related' witnesses

[281] As analysed at the outset of the prima facie case, these witnesses

cannot be described as 'interested' witnesses as they enjoy no direct benefit or interest from the outcome of these cases. Some of them are related to one of the deceased victims, Murali, and friends of all the victims, but that in itself is insufficient to taint their evidence. In actuality, the fact that they are related to or close friends of the deceased victims would ensure that they would want only the correct or right persons to be brought to justice.

[282] In *Gopal Singh v State of Uttar Pradesh* AIR 1979 SC 1822, an appeal against a conviction under s 302 of the Indian Penal Code for the murder of four persons, the prosecution witnesses were related to the deceased victim. In accepting their evidence of the events, Sarkaria J stated as follows:

> The mainstay of the prosecution case was the ocular account given by the two injured persons, namely Smt Doraji and Anangpal Singh. They had gun shot injuries which were the hallmarks of their presence at the scene of occurrence. *True they were interested witnesses, related to the deceased. Far from undermining the circumstances of the case, it guarantees the truth of their testimony. Being relations, they would be the least disposed to falsely implicate the appellant, or substitute him in place of the real culprit.* In short, the murder charges had been proved to the hilt against the appellant...

And in *State of Uttar Pradesh v Hakim Singh* AIR 1980 SC 184, the Supreme Court of India held as follows in relation to the issue of related witnesses:

> *... One of the general grounds on which evidence of these two witnesses was rejected by the High Court was that these witnesses were partisan or interested witnesses. Being near relations and living practically in the same house these witnesses cannot be said to be interested witnesses, but are very natural witnesses...*

Similarly in *Kumar Majhi v State* 1981 Cri LJ 1787 where the widow the deceased victim was the primary witness the court held:

> ... There is no material on the record to show that the witness had any axe to grind against the appellant She had nothing to gain by giving a wrong description of the occurrence in which the husband met with death. *The argument that PW3 is an interested witness being the widow of the deceased does not carry any weight unless the credit of the witness can be said to have been shaken in cross-examination. There is no apparent reason why she would omit the name of the real assailant and substitute in his place the name of the appellant.* The trial court, on a careful appraisal of the evidence of PW3 believed the prosecution's case and we see no cogent ground to take a different view.

[283] The question that arises is this. Did the eyewitnesses concoct or make up this entire version of events against Lobo and Sivan? Did they have an axe to grind against the accused persons?

[284] A perusal of the record of evidence as a whole discloses that there is

no evidence on record to the effect that there was any animosity between any or all of these witnesses, ie the prosecution and the defence witnesses. Although some questions were put to the prosecution witnesses at the early stages of the case, suggesting that there were differences of opinion or fights between the accused persons and Datchinamoorthy, SP5, this was not followed through in the defence case. In any event all the witnesses, both for the prosecution and the defence were consistent in their evidence that there was no animosity between the eyewitnesses and the accused persons, or even the victims. In the absence of any such evidence on record, particularly in view of the accused persons themselves conceding that there is no animosity or ill-will between the eyewitnesses and themselves, there is no basis for an inference or conclusion that the eyewitnesses lied, because of their dislike or ill-feeling against the accused persons.

[285] As there is no basis for the prosecution witnesses to 'concoct' their version of events against the accused persons, it remains to be considered whether the witness version of the eyewitnesses should be rejected on grounds of a lack of credibility, or by reason of the existence of discrepancies or material contradictions in their evidence sufficient to warrant their evidence being dismissed. The numerous contradictions raised by the defence during the course of the prosecution's case has been dealt with at some length and does not bear repetition. In the context of the defence version, as stated above, the starkly different versions of events does not warrant a further reconsideration of the eyewitnesses' events in detail as it would also amount to a repetition of issues raised prior to this.

[286] It therefore follows that in weighing up the evidence of the prosecution witnesses against the testimony of the defence witnesses, it falls to be considered whether the defence version of events throws a credible doubt on the testimony afforded by the eyewitnesses. Having considered the defence witnesses' version of events, does it leave a reasonable doubt in the mind of the court to the effect that the two accused persons could not have caused the deaths of the victims? Or put another way, can it be said that the prosecution has shown beyond reasonable doubt that the two accused persons caused the deaths of the three victims?

How is the evidence of the eyewitnesses to be treated in the light of the evidence adduced during the course of the defence case?

[287] How then is the evidence of the eyewitnesses to be considered? What are the factors or indicia that would warrant such evidence being rejected or ousted? The collective evidence of the eyewitnesses would have to be rejected or ousted, if it lacks credibility or is wholly improbable in the light of the defence witnesses' evidence. In the instant case the evidence of the

eyewitnesses, particularly for the purposes of the assessment of credibility during the course of cross-examination, has been examined at length and in great detail during the analysis of the prosecution's case. It does not behove this court to do so at length once again here, particularly as the defence version of events is completely at odds with the prosecution's version of events. As concluded earlier, the evidence of these witnesses is not only creditworthy, but natural and straightforward, with a ring of truth to it. It cannot simply be ignored or ousted on the basis that the defence version challenges it. Despite the fact that the killings of Raguram, Murali and Boy took place in a crowded environment at night during the course of a religious festival, the ocular evidence furnished by the eyewitnesses was relatively clear, detailed and sound. The fact that there were other persons involved in a fight during and after the incident also does not detract, in itself, from the version of events spelt out by these witnesses. In *Akil Ali & Ors v State of Assam* 1981 Cri LJ 516 where too there was a general fight involving numerous people, this is what the appellate court stipulated in dealing with the evidence of eyewitnesses:

> ... Mr Laskar submits that there was a melee and nobody knows who assaulted whom and as such the evidence of these partisan witnesses who claimed to have seen only part of the occurrence must be disbelieved. We are not inclined to accept this submission. Melee means a free fight in which the combatants are mingled together, confused general fight between groups or among combatants. From the evidence on record we do not have the idea of a mixed free fight with such a confusion that it was not possible for these witnesses to have traced the occurrence in so far as their near and dear ones were concerned. The evidence on record is not such as will justify our refusal to scrutinise the specific evidence and reject the whole on the ground of a melee. In *Muthu Naicker v State of Tamil Nadu,* 1978 Cri LJ 1713 Their Lordships of the Supreme Court observed that where there is a melee and a large number of assailants and number of witnesses claimed to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence is undoubtedly partisan, the distinct possibility of innocent being falsely included with the guilty cannot easily be ruled out. In faction ridden society where an occurrence takes place involving rival factions, it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously it is to be borne in mind that the tendency to involve as many persons of the opposite faction as possible by merely naming them as having been seen in the melee is to he eschewed and therefore, the evidence has to be examined with utmost care and caution. Earlier in *Maswalti v State of UP* AIR 1965 SC 202 the Supreme Court observed that *where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. Such a test, though apparently mechanical, was held to be reasonable. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with*

such cases; and it is their duty to sift the evidence carefully and decide which part of it is reliable and which is not and it should try to be assured of the role attributed to an individual offender.

[288] As a consequence the ocular accounts of the deaths of the three victims cannot be dismissed outright simply because the defence version of events conflicts with it, unless it is concluded that the credibility of the eyewitnesses was severely shaken, so as to warrant the conclusion that they were lying outright. In this case the court was urged to reject the eyewitness accounts which comprised the mainstay of the prosecution's case on the grounds that their accounts were inaccurate, unreliable and improbable as the eyewitnesses could not recollect many details of the incident and were not wholly consistent particularly as to the positions adopted by the assailants, and precisely what they saw. However a perusal of their evidence in their entirety shows a consistency in relation to:

(a) the general timing of the incident;

(b) the presence of all the witnesses, accused persons, witnesses and their friends at the scene of the incident;

(c) the place where the stabbings took place is also commonly described by all the witnesses as being in front of the Mariamman temple;

(d) the chronology of the occurrences is identical as far as all the eyewitnesses are concerned;

(e) the manner in which the injuries were effected;

(f) the events immediately after the incident, although there are differences as to who precisely assisted each of the victims and the manner of assistance that was accorded;

(g) information was given to the police by the eyewitnesses within a short time of the incident after the victims had passed away and been taken to the hospital;

(h) the police were able to act on the eyewitness accounts to commence investigations and seek the relevant suspects;

(i) the identification of the persons involved was considerably eased by the fact that the eyewitnesses and the accused persons knew each other well by sight;

(j) the postmortem report corroborates the eyewitness accounts of the infliction of injuries; and

(k) there is corroboration between the several eyewitness accounts as outlined previously.

[289] When the defence version of events is compared to the prosecution events, it is evident that several facts are incontrovertible:

(i) all the persons named as being present is agreed by all the witnesses;

(ii) the fact that they were all grouped near the temple premises and in a tent across the road from the temple is not in dispute;

(iii) it is also not in dispute that a festive drum recital was ongoing at the time and that people were dancing in front of the temple; and

(iv) a fight or scuffle broke out in the course of the evening.

Visibility of events that night

[290] SD1, Lobo in his evidence maintained that while there was light within the tent and the temple, it was dark on the strip of road between the tent and the temple where the three victims were injured. He also maintained that there was a large crowd at the time when the injuries were inflicted. The net effect of his testimony as was the case with Bontal was to recreate a picture of poor visibility as a consequence of a lack of light and large crowds. Notwithstanding this, however, he was able to testify that not only did he see Murali and Raguram in the tent, but that he could read the words on the cans that they were carrying such that he knew they were drinking beer. This evidence detracts from his claim of poor visibility. As for the crowds, it is apparent that the crowd was not so large as to prevent all the witnesses from noting their mutual presence at the temple that evening.

Identification

[291] The other factor that has to be borne in mind with regard to the eyewitnesses testimony and the poor visibility as well as the crowd that night is that they knew the persons they identified as assailants, ie, the accused persons. This is not a case where the assailants were unknown persons whom the eyewitnesses had never seen before and were identifying for the first time. This is a case where all the persons involved, namely the eyewitnesses, the accused persons and the victims all knew one another. The likelihood of 'mistaken' identity or a lack of light affecting their testimony is greatly reduced if not negatived altogether. The issue of recognising the assailants does not arise. This is another reason which precludes the exclusion simpliciter, of the ocular evidence.

Sivan's evidence in relation to the events on 19 September 2004

[292] In the course of his evidence as detailed above, it was evident that Sivan was not being entirely truthful in relation to his evidence about

attending Boy's funeral the following day. He initially stated that he went to Boy's house for the funeral on the morning of 19 September 2004, but retracted this hurriedly when informed that at that hour, the post-mortem on Boy was still being conducted. He then maintained that he went to Boy's grandmother's house at 3pm that day for the funeral. However he spoke to no-one and did not offer any condolences. It was evident from his demeanour that he was uncomfortable. This portion of his evidence was patently not true.

[293] Taken as a whole, his evidence failed to hold together. While he appeared to have a great fondness for Boy up to and until a fight broke out on the night of 18 September 2004, he then seems to have completely lost interest or concern entirely for his 'close' friend. The disparity between his conduct prior to and after the events of that night, appear to my mind to be irreconciliable. His failure to have any regard whatsoever for Boy's well being and safety that night and thereafter, simply does not correspond the allegedly close relationship he shared with Boy prior to the night of 18 September 2004. The failure to even attempt to call him on the telephone to enquire after his well being does not ring true. His evidence that he was 'locked-in' to his house by his mother after he returned home appears contrived.

Interference with the identification of the accused persons by SP21, ASP Othman

[294] Another aspect of both Sivan's and Lobo's evidence which appeared to be an after thought was that relating to an allegation that SP21, ASP Othman had told the eyewitnesses to identify Lobo, Bontal and Sivan as the perpetrators of the killings, immediately prior to the identification parade. This very serious allegation was not put to ASP Othman during the entirety of the prosecution's case, see *Chua Beow Huat v PP* [1970] 2 MLJ 29 where it was said:

> Wherever the opponent has declined to avail himself of the opportunity to put essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It is a rule of essential justice.

[295] This serious allegation was however, suggested to several of the eyewitnesses who rejected the proposition outright. Apart from this, the defence witnesses account of the events was so crudely and baldly stated as to warrant the conclusion that it was untrue. As stated above, these witnesses maintained that ASP Othman simply pointed to them and told the eyewitnesses they committed the killings. That one statement would cause the eyewitnesses to 'concoct' the very detailed and coherent version of events they subsequently presented in court, is wholly incredible. Furthermore there

is no cogent reason why ASP Othman would go to the trouble and risk of taking the accused persons to a room and showing them to the eyewitnesses, when he could simply have told the eyewitnesses verbally to identify the accused persons as the perpetrators. This is because all the eyewitnesses knew the accused persons before hand. In fact it is on the basis of the information that they furnished to the police immediately after the incident that the police could proceed with their investigations, resulting in the accused persons turning themselves in to the police.

The absence of Jeganathan

[296] A further issue raised by counsel for SD1, Lobo is that the prosecution failed to ensure the attendance of one Jeganathan a/l Selvaraj as a witness for the defence, and accordingly an adverse inference ought to be drawn against the prosecution. However the statement of the said Jeganathan under s 113 of the CPC was tendered and received in evidence and comprises a part of the record of evidence. His statement was tendered through SP21, ASP Othman who also explained that although several attempts had been made to serve a subpoena on Jeganathan, he could not be located. A service report to that extent was also tendered in court. It therefore appears that a genuine effort was made to secure Jeganathan's attendance and the police cannot be faulted for his absence.

[297] Jeganathan's statement under s 113 (exh D33) states that he went with Murali to the Maha Mariamman temple on the night of 18 September 2004 at midnight or thereafter. They went together in a lorry. According to him, after they arrived, he and Murali stood at the side of the road in front of the temple with four or five other friends of Murali's, whom he did not know. About twenty to thirty people, in his estimation were awaiting the chariot and procession with the beating of drums and dancing. Then he said, a person from the group who was dancing came out and dragged Murali's friend by the name of Raguram into the group and started beating him. When they saw this, he and Murali went to the group to try and separate them. According to his statement, while Jeganathan was trying to protect Raguram from being beaten by the said man, his left hand was slashed and began to bleed. Jeganathan immediately ran away to the main road. There he met his friend Suresh (Murali's brother) and told him what had happened. Suresh took him to hospital. When he got there he found that three persons had been taken to the hospital, dead.

[298] Jeganathan stated that although he did not know the person who had pulled Raguram and beaten him, he could identify him. He thought that the person who pulled Raguram had used a knuckle duster. However during the

identification parade that was held, Jeganathan could not identify any of the persons present. He did not identify Lobo.

[299] On the basis of the foregoing, it was contended that SD1, Lobo could not have been the one who had stabbed Raguram. It was further contended that as Jeganathan had not been produced, an adverse inference ought to be drawn against the prosecution.

[300] In short it was contended that some person other than SD1, Lobo must have injured Raguram because Jeganathan had not identified Lobo at the identification parade. However the fact that Jeganathan did not do so does not exclude Lobo entirely. The matter of significance to note is that Jeganathan left the scene where Raguram was being beaten prior to his being stabbed. He did so because he himself was hurt. As such he did not and could not have seen the identity of the person who stabbed Raguram. It should be borne in mind that the injury to Raguram's heart was the injury that killed him. In so far as this attack is concerned there are no less than three eyewitness accounts (SP3, SP4 and SP5) of Raguram being stabbed by Lobo. Is it then to be concluded either that:

(a) by reason of Jeganathan's omission to identify Lobo, that Lobo did not in fact stab Raguram fatally?

(b) An adverse inference ought to be drawn against the prosecution for failing to call Jeganathan as a witness?

[301] The omission to identify Jeganathan does not detract substantially from the evidence of the eyewitnesses because his evidence pertains to evidence immediately prior to the stabbing. It requires however that the eyewitnesses evidence be scrutinised carefully, as has been done above.

[302] As for the failure to call Jeganathan as a witness, it is in evidence that the prosecution sought to call him, at the very least for the defence. They cannot be faulted because he could not be located. In any event, the prosecution did call several other eyewitnesses on the same issue.

[303] In *Malak Khan v Emperor* AIR 1946 PC 16, Lord Porter observed pertinently as follows with regards to the calling of prosecution witnesses:

> It is no doubt very important that as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly

taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be leveled at the absence of possible witnesses.

[304] The inability to locate Jeganathan and call him as a witness does not destroy the fabric of the case.

Have the second and third accused persons raised a credible defence which meets the prosecution case against them?

[305] As analysed above, it appears that Lobo and Sivan have failed to raise a credible defence or a reasonable doubt in respect of the prosecution's case against them. The essence of their case was never put to the prosecution witnesses during the course of the prosecution's case. In fact, apart from seeking to damage the credibility of the prosecution witnesses, it was never clear what the defence was during the course of the prosecution's case. It appears to this court that the defence is very much an after thought that has been fabricated to meet the prosecution case (see *Public Prosecutor v Zulkipli bin Othman & Ors* [2005] 5 MLJ 170 and *Alcontara a/l Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209 on the late disclosure of defence).

[306] More significantly, the defence version of events as analysed above lacked credibility and truth in the face of the evidence adduced by the prosecution as:

(i) it failed to address the eyewitness accounts given by SP2, SP3, SP4 and SP5;

(ii) it failed to provide any basis or reason for the eyewitnesses to 'fabricate' such evidence;

(iii) despite discrepancies in the evidence of the prosecution witnesses, particularly the eyewitnesses, they were not of such significance or materiality to warrant a finding that the witnesses were fabricating or concocting their evidence. In this context the words of RR Singh JC in *Dahirai Riang v The State* AIR 1964 Tripura 54 (v 51 C 19) are relevant:

> ... Moreover, due to lapse of time minor discrepancies or omissions are bound to occur in the statements of witnesses. But such trifling discrepancies, should be ignored as they are often a test of truth. Several persons giving their versions of a transaction witnessed by them are naturally liable to disagree on minor points. Their power of observation, experience or memory are not the same and honest differences are easily possible. It must be remembered that there are discrepancies of truth as well as of falsehood. It is the broad facts of a case and not the little details that are to be considered in weighing

A evidence. It is therefore wrong to expect mathematical precision in the statements of witnesses and to disbelieve them on the basis of trifling discrepancies or omissions. Besides that there is no conceivable reason why this and other witnesses should implicate the appellant in the serious charge of dacoity with murder...

B And in *Ugar Abir and others v The State of Bihar* AIR 1965 SC 277 Subha Rao J in delivering the judgment of the Supreme Court of India expounded as follows:

C ... The maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate D the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest.

(iv) The evidence of the defence witnesses appeared to be tailored to meet E their contention that they were absent when the killings took place. To that end, SD2, Sivan, SD3, Bontal and SD4, Suresh all seemed to have taken special note, despite the crowd of particularly Lobo's movements, and seemed able to have noted their absence from the crowd at the same time as they themselves were fleeing from that place. This evidence was F not credible;

(v) The evidence of SD1, Lobo contradicts that of SP13 Anbarasu in a material particular, which was not addressed. Anbarasu gave uncontradicted evidence that Lobo participated in the fight that night. This provides further corroboration of the eyewitness accounts of the G evidence of that night.

(vi) The evidence of SD2, Sivan is also not credible vis-a-vis his relationship with Boy and the events of that night. For him to have so suddenly and wholly lost contact with Boy without his making any attempt H whatsoever to locate him is implausible.

[307] In summary, looking at the entirety of the evidence there appears to be no reason for the eyewitnesses to fabricate the entirety of their version of events. Their credibility remains unshaken by the defence version of events I which does not serve to refute or contradict their version in detail, but simply removes the key players, ie, the accused persons from the scene of the incident at the relevant time. The defence as put through its witnesses appears to have been finely crafted to neatly meet the prosecution's case by citing the absence of the accused persons, thereby providing an alibi of sorts which contradicts

the prosecution's version of events without directly attacking it. In these circumstances, the court concludes that on a consideration of the evidence in its entirety, Lobo and Sivan have failed to raise a reasonable doubt through their defence in respect of the charges brought and proved against them. The prosecution has proved beyond reasonable doubt that Lobo and Sivan caused the deaths of the three victims.

MOTIVE

[308] In the entire course of the case, no motive for the three killings was established by the prosecution. What is the effect of a failure to prove motive? In State of *Haryana v Sher Singh* 1981 Cri LJ 714 the Indian Supreme Court described it thus:

> ... The prosecution is not bound to prove motive of any offence in a criminal case, in as much as motive is known only to the perpetrator of the crime and may not be known to others. If the motive is proved by prosecution, the court has to consider it and see whether it is adequate. In the instant case, the motive proved was apparently inadequate although it might be possible.

And in *Nachhittar Singh v State of Punjab* AIR 1975 SC 118 the Indian Supreme Court explained the consequences of a failure to establish motive as follows:

> ... Be that as it may, the failure of the prosecution to establish the motive for the crime does not mean that the entire prosecution case has to be thrown overboard. It only casts a duty on the court to scrutinise the other evidence, particularly of the eyewitnesses with greater care. The High Court was fully conscious of the need for such caution and rightly observed:
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> > The absence of proof of motive has this effect only that the other evidence bearing on the guilt of the accused has to be very carefully examined.

[309] In the instant case, as the prosecution has not adduced evidence establishing motive, it therefore becomes necessary to scrutinise the other evidence primarily the eyewitness accounts with greater care. Such an analysis has indeed been undertaken, particularly in relation to the numerous issues raised by the defence in the course of the trial. The court concludes at the end of such analysis that the eyewitness accounts are corroborative as is the evidence of the pathologist, SP20.

Did Sivan commit murder falling within the definition of s 300 of the Penal Code?

[310] At the close of the prosecution case, I concluded that Sivan had

committed murder under s 300 more particularly limb (c) of the said section. Having heard the defence and considered the evidence in totality, I have had reason to reappraise the evidence as a composite whole. Having done so, it appears to this court that on a consideration of the entirety of the evidence, the requisite mens rea element for the purposes of establishing murder is not fully made out in the case of Sivan. The chronology of events shows that the stabbing of Boy was done very quickly after Boy intervened to assist Murali, when Sivan pushed the injured Murali away and stabbed Boy in the chest. This was done quickly, almost as a reflex action in response to Boy's intervention in assisting Murali whose neck had been slashed.

[311] It falls to be considered firstly, whether Sivan, who delivered the fatal stab wound to Boy's heart, causing his death, possessed the requisite intention to cause death under limbs (a), (b), (c) or (d) of s 300, as contended by the prosecution. It also needs to be considered whether his act amounted instead to culpable homicide under s 304(a) of the Penal Code. The distinction has been fully considered in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 177 where Raja Azlan Shah FJ (as His Royal Highness then was) explained the distinction between the provisions of ss 299 and 300 of the Penal Code. This is what he said:

> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that the act is likely to cause death.
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> Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and... *is sufficient in the ordinary course of nature to cause death*; (4) with the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.
>
> The words which I have italicised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. *Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.* Illustration (d) of s 300 of the Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. *It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death*. Illustration (c) given in s 300 of the Penal

Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of ss 299 and 300 is the tenuous contention that s 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions of s 300 apply, and if by reason of the absence of the necessary degree of mens rea an offence does not fall within s 300, it cannot be one of culpable homicide. *Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code.* We would like in this connection to express the need to bear in mind that all cases falling within s 300 of the Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300. the first part of s 304 of the Penal Code covers cases which by reason of the exceptions are taken out of the purview of s 300 cll (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s 299, but not within s 300, cll (2) and (3). The second part of s 304 of the Penal Code covers cases falling within the third part of s 299 not falling within s 300, cl (4).

[312] Here the prosecution contended that limb (c) of s 300 had been satisfied in that Sivan executed the fatal stab wound to Boy's chest with the intention of causing bodily injury to Boy and the bodily injury was sufficient in the ordinary course of nature to cause death. This was further supported by the pathologist, SP20. I had concluded at the close of the prosecution's case, that indeed this ingredient of s 300(c) had been adequately fulfilled. On a consideration of the entirety of the evidence at the close of the prosecution's case, however, my views on this issue have changed. The chronology of events shows that the second and third deaths arose as a consequence of Murali and Boy intervening to assist first Raguram and then Murali himself. The fact that Sivan stabbed Boy and warned him against intervention shows that he clearly intended to cause severe bodily injury or harm to Boy. *The act of directing and plunging the knife he held into Boy's chest in the region of his heart to the depth penetrated, warrants the conclusion that he was intent on causing such bodily injury as is likely to cause death. It is not possible however to conclude with any degree of certainty that the injury inflicted by Sivan must in all probability have caused Boy's death.* This is because of the almost spontaneous reaction of Sivan in reacting to Boy's acts. It does not suggest any degree of premeditation. The facts of this case therefore appear to fall within the lesser offence of culpable homicide not amounting to murder falling within the first part of s 304 of the Penal Code.

Did Lobo commit murder falling within s 300 of the Penal Code in respect of both Raguram and Murali?

[313] That the elements of s 300 limb (a) and (c) were satisfied in respect of the deaths of Raguram and Murali was similarly established at the close of the prosecution case. Although the defence case does not materially affect the court's findings at the close of the prosecution case, a consideration of the events in their totality has caused the court to reappraise the mens rea element of the offence of murder in s 300.

[314] Lobo's acts vis-a-vis Raguram, where by Raguram was attacked and then stabbed in a vital part, namely his heart, falls within the ambit of the section in that the manner and circumstances of the attack show that Lobo took undue advantage of Raguram and acted in a cruel manner, warranting the attribution of an intention to kill.

[315] Such an intention is not so readily ascribed to Lobo's actions in relation to Murali, in that although again a vital part of Murali's body, namely his left carotid artery was severed in the attack, the chronology of events suggests that the attack on him was brought about by way of a response to his intervention in attempting to extricate Raguram. It is therefore not evident that Lobo intended to kill Murali when Murali intervened to protect Raguram. Given the instantaneous and spontaneous response of Lobo, it appears more correct to surmise from the sequence of events that by his actions he intended that Murali should be severely injured, but not necessarily that death be the most probable result of his attack. In accordance with the distinction between culpable homicide and murder as set out above in *Tham Kai Yau*'s case, it appears that the act of Lobo in attacking and slashing Murali's neck more properly falls within the ambit of culpable homicide rather than murder.

CONCLUSION

[316] The second accused, Thenegaran a/l Murugan therefore stands convicted of murder punishable under s 302 in respect of the death of Raguram and stands convicted of culpable homicide under s 304 limb (a) in respect of the death of Murali in respect of the latter offence. After hearing his plea in mitigation a sentence of 12 years imprisonment commencing from date of arrest was imposed on him.

[317] The third accused, Sivan a/l Kanthasamy stands convicted of culpable homicide under s 304 limb (a) in respect of the death of Boy, otherwise known as Thiayagarajan a/l Venketaswaran Rao.

[318] After hearing his plea in mitigation a sentence of eleven years imprisonment commencing from date of arrest was imposed on him.

Second accused convicted and sentenced to 12 years imprisonment and third accused convicted and sentenced to 11 years imprisonment.

Reported by M Sivabarathi